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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 393.120

THE PHŒNIX INSURANCE COMPANY OF BROOKLYN, APPELLANT,

vs.

THE ERIE AND WESTERN TRANSPORTATION COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED OCTOBER 16, 1882.

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INDEX.

	Original.	Print
Caption	1	1
Transcript from district court	2	
Caption	2	1
Libel	2	1
Affidavit of Wm. R. Crowell	6	6
Order for process	7	7
Monition	8	8
Return to monition	9	9
Claim and protest	9	9
Stipulation for payment of costs	10	10
Stipulation to answer decree	10	11
Warrant of restitution	11	12
Return to warrant	12	13
Answer	12	13
Exhibit A—Form No. 12—Chicago, of Anchor Line	23	26
B— " " " &c.	24	28
C— " " " "	24	28
Additional stipulation to answer decree	25	29

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	Original.	Print
Decree	26½	31
Clerk's certificate	27	32
Hearing	28	32
Decree	28	32
Order allowing appeal	29	33
Findings of fact	29	33
Conclusions of law	38	41
Bond	39	42
Clerk's certificate	42	43
Citation	43	43

1 Circuit Court of the United States for the Eastern District of Wisconsin.

UNITED STATES OF AMERICA,
Eastern District of Wisconsin, } ss:

At a special term of the circuit court of the United States for the eastern district of Wisconsin, begun and held at the city of Milwaukee, in said district, on the first Tuesday (being the first day) of August, A. D. 1882.

Present: The Honorable Thomas Drummond, circuit judge, presiding; Henry Fink, marshal; Edward Kurtz, clerk.

Among other the following proceedings were had, to wit:

THE PHŒNIX INSURANCE CO. OF BROOKLYN, Libellant and Appellant,
vs.
THE ERIE & WESTERN TRANSPORTATION COMPANY, Respondent.

Appeal in Admiralty.

Be it remembered that heretofore, to wit, on the 24th day of April, A. D. 1880, a certified transcript of record on appeal of said cause from the district court was received from the clerk of said court, and filed as follows: (Omitting the testimony.)

2 District Court of the United States of America for the Eastern District of Wisconsin.

UNITED STATES OF AMERICA,
Eastern District of Wisconsin, } ss:

At a stated term of the district court of the United States for the eastern district of Wisconsin, begun and held according to law at the city of Milwaukee, in said district, on the first Monday (being the fifth day) of January, A. D. 1880.

Present: The Honorable Charles E. Dyer, judge of said court, presiding; Henry Fink, marshal; Edward Kurtz, clerk.

Among other the following proceedings were had to wit:

THE PHŒNIX INSURANCE COMPANY OF BROOKLYN,
vs.
THE ERIE & WESTERN TRANSPORTATION COMPANY. } In Admiralty.

Be it remembered that heretofore, to wit, on the twentieth day of August, A. D. 1877, came said libellant, by its proctors, Messrs. Van Dyke & Van Dyke, and presented to the court its libel against said The Erie & Western Transportation Company, as follows:

Libel. In Admiralty.

To the Honorable Charles E. Dyer, judge of the district court of the United States for the eastern district of Wisconsin:

The Phœnix Insurance Company of Brooklyn, in the State of New York, exhibits this its libel against the Erie & Western Trans-

portation Company, owner at the times hereinafter mentioned of the steam propeller Merchant, in a cause of contract, civil and maritime.

And thereupon the libellant doth allege and articulately propound as follows, to wit:

First. That the libellant is a body corporate, created by the laws of the State of New York, and empowered, amongst other things, to do and transact a general lake and inland insurance business, and to make the contracts of insurance hereinafter mentioned.

Second. That the Erie & Western Transportation Company is a body corporate, created by the laws of the State of Pennsylvania, and empowered amongst other things to do and transact the business of transportation of goods, wares, and merchandise, to and from the city of Erie, in the State of Pennsylvania, upon the lakes and rivers, and competent to make the contracts of shipment hereinafter mentioned.

Third. That at the times hereinafter mentioned the Erie &
3 Western Transportation Company was the owner of the steam propeller Merchant, hereinafter referred to.

Fourth. That said propeller was at said times a vessel of twenty tons burden and upwards, and enrolled and licensed for the coasting trade, and employed in the business of commerce and navigation between ports and places in different States and Territories upon the lakes and navigable waters connecting said lakes.

Fifth. That said Erie & Western Transportation Company in the month of July, 1874, was a common carrier upon the lakes and navigable waters connecting said lakes between the port of Chicago, in the State of Illinois, and the port of Erie, in the State Pennsylvania, and was then the owner of said propeller Merchant as aforesaid, which vessel was then used by said company as a common carrier as aforesaid.

Sixth. That on or about the 24th day of July, 1874, the firm of A. M. Wright & Co., then being the owner thereof, caused to be shipped on board said propeller Merchant, then lying at the port of Chicago and bound on a voyage to the port of Erie aforesaid, 16,325.34 bushels of corn of the value of about $11,000, said corn then being in a sound and good condition, the same to be carried to said port of Erie, and there in like good order and condition delivered for said shipper for transshipment, loss or damage by fire, collision, or the dangers of navigation while on seas, bays, harbors, rivers, lakes, or canals only excepted; that said corn so shipped was consigned to said firm of A. M. Wright & Co., Liverpool, England, and was to be so carried and delivered in consideration of certain freight to be paid therefor by said shipper upon complete delivery of said corn as aforesaid.

Seventh. That libellant did make assurance upon said corn for said voyage, and did underwrite a policy against a marine risk thereon.

Eighth. That said propeller left said port of Chicago on or about the 24th day of July, 1874, and proceeded on her voyage aforesaid, with said corn laden on board; but said Transportation Company,

though not prevented by loss or damage by fire, collision, or the dangers of navigation while on seas, bays, harbors, rivers, lakes, or canals, did not safely carry and transport the said corn and deliver the same in like good order and condition as it had undertaken to do; but on the contrary thereof, by reason of the unseaworthiness of said propeller and of the unskillfulness, mismanagement, carelessness, and negligence of said Erie & Western Transportation Company, its officers, agents, and servants, in the conduct and management of said propeller on her said voyage, the said propeller was stranded on the western shore of Lake Michigan, and said corn was greatly damaged and lost.

Ninth. That by reason of such unseaworthiness of said propeller and the wrong of said Transportation Company, its officers and agents and servants, and the loss and damage resulting therefrom to said corn, the said corn was, on or about the 12th day of August, 1874, abandoned by said firm of A. M. Wright & Co. to the libellant, and libellant was compelled, and did, on or about the 19th day of August, 1874, pay to said firm of A. M. Wright & Co. the sum of eight thousand (8,000) dollars, by reason of the assurance aforesaid.

Tenth. That by reason of the premises, the libellant then and there became subrogated to all the rights, interests, and rights of action of said firm of A. M. Wright & Co., the owners of said corn so damaged and lost and insured as aforesaid.

4 Second Cause of Action.

Eleventh. That on or about the 24th day of July, 1874, the said propeller Merchant, then lying at the port of Chicago aforesaid, and bound on the voyage aforesaid, the firm of Elmendorf & Co., then being the owners of 800 bushels of corn of the value of about $600, caused the same to be shipped on board of said propeller, said corn then being in a sound and good condition, to be safely carried from said port of Chicago to the port of Erie, aforesaid, there to be delivered for said shipper in like good order and condition for transshipment, loss or damage by fire, collision, or the dangers of navigation while on seas, bays, harbors, rivers, lakes, or canals only excepted; and that said corn so shipped was consigned to said firm of Elmendorf & Co.; 400 bushels thereof to Bound Brook, New Jersey, and 400 bushels thereof to Newark New Jersey, and was to be so carried and delivered in consideration of the payment of certain freight to be paid by said firm of Elmendorf & Co. on the complete delivery of said corn as aforesaid.

Twelfth. That the libellant did make assurance upon said 800 bushels of corn for said voyage, and did underwrite a policy against a marine risk thereon.

Thirteenth. That said propeller left said port of Chicago on or about the 24th day of July, 1874, and proceeded on her said voyage with said corn laden on board; but said Erie & Western Transportation Company, though not prevented by loss or damage by fire, collision, or the dangers of navigation while on seas, bays, harbors, rivers, lakes, or canals, did not safely carry and transport said corn and deliver the same in like good order and condition as it had

undertaken to do; but on the contrary thereof, by reason of the unseaworthiness of said propeller and of the unskillfulness, mismanagement, carelessness, and negligence of said Transportation Company, its officers, agents, and servants, in the conduct and management of said propeller on her said voyage, said propeller was stranded on the western shore of Lake Michigan, and said corn was greatly damaged and lost.

Fourteenth. That by reason of such unseaworthiness of said propeller and of the wrong of said Erie & Western Transportation Company, its officers, agents, and servants, and the loss and damage resulting therefrom to said corn, the said corn was, on or about the 12th day of August, 1874, abandoned by said firm of Elmendorf & Co. to libellant, and libellant was compelled, and did, on or about the 19th day of August, 1874, pay to said firm of Elmendorf & Co. the sum of $548, by reason of the assurance aforesaid.

Fifteenth. That by reason of the premises the libellant then and there became subrogated to all the rights, interests, and rights of action of said firm of Elmendorf & Co., the owners of said corn so damaged and lost and insured as aforesaid.

Third Cause of Action.

Sixteenth. That on or about the 24th day of July, 1874, the firm of Gilbert Wolcott & Co., then being the owners of 689.02 bushels of white oats and 370.30 bushels of number two corn, caused the same to be shipped on board of said propeller Merchant, then lying at said port of Chicago, bound on the voyage aforesaid, said corn then being in a sound and good condition, and of the value of about $600, to be safely carried and transported and delivered for said shipper, in like good order and condition, for transshipment at said port of Erie, loss or damage by fire, collision, or the dangers of navigation while on seas, bays, harbors, rivers, lakes, and canals only excepted; and that said grain so shipped was consigned to said firm of Gilbert Wolcott & Co., Tamaqua, Pennsylvania, and was to be so carried and delivered in consideration of certain freight to be paid therefor by said shipper on the complete delivery of said grain as aforesaid.

Seventeenth. That libellant did make assurance upon said grain for said voyage, and did underwrite a policy against a marine risk thereon.

Eighteenth. That said propeller left said port of Chicago, on or about the 24th day of July, 1874, with said shipment of grain laden on board; but said Transportation Company, though not prevented by loss or damage by fire, collision, or the dangers of navigation while on seas, bays, harbors, rivers, lakes, or canals, did not safely carry and transport said grain and deliver the same in like good order and condition, as it had undertaken to do; but on the contrary thereof, by reason of the unseaworthiness of said propeller and the unskillfulness, mismanagement, carelessness, and negligence of said Erie and Western Transportation Company, its officers, agents, and servants, in the management and conduct of said propeller on her

said voyage, said propeller was stranded on the western shore of Lake Michigan, and said grain was greatly damaged and lost.

Nineteenth. That by reason of such unseaworthiness of said propeller, and the wrong of said Erie & Western Transportation Company, its officers, agents, and servants, and the loss and damage resulting therefrom to said grain, the said grain was on about the 14th day of August, 1874, abandoned by said firm of Gilbert Wolcott & Co. to the libellant, and said libellant was compelled, and did, on or about the 19th day of August, 1874, pay to said firm of Gilbert Wolcott & Co. the sum of seven hundred (700) dollars, by reason of the assurance aforesaid.

Twentieth. That by reason of the premises the libellant then and there became subrogated to all the rights, interests, and rights of action of said firm of Gilbert Wolcott & Co., the owners of said grain so damaged and lost as aforesaid.

Twenty-first. That said several shipments of grain were jettisoned and pumped overboard from propeller while she lay upon said strand, in the effort of said respondent to release and lighten off said propeller and the balance of her cargo from said strand, and were wholly lost, excepting a portion of said shipment of corn aforesaid, amounting to about 5,188 bushels, which was brought into the port of Milwaukee, in the State of Wisconsin, on or about the 31st day of July, 1874, in a wet, damaged, and perishable condition, and was unfit for transshipment, and was then and there sold by said Erie & Western Transportation Co., its agents and servants, for the sum of ten hundred and thirty-seven and sixty one-hundredths (1037.60) dollars, which proceeds of said sale said Transportation Company thereafter received and now holds, and has paid no part thereof to this libellant.

Twenty-second. That said Erie & Western Transportation Company owns and uses in its said business of common carriers as aforesaid the following steam propellers, viz., "India," "China," "Japan," "Winslow" "Alaska," and "Philadelphia," which said propellers touch at said port of Milwaukee, in the State of Wisconsin, and are, from time to time, within the jurisdiction of this court; and that said Transportation Company owns and are possessed of other certain personal property now within the admiralty and maritime jurisdiction of this court.

Twenty-third. That all and singular the premises are true.

Wherefore the libellant prays that process in due form of law, according to the course and practice of this court in cases of
6 admiralty and maritime jurisdiction, may issue against the Erie & Western Transportation Company, and against any personal property to the said Erie & Western Transportation Company belonging within said eastern district of Wisconsin, and that said property, or any part thereof, may be attached and held to enforce the appearance of said Erie & Western Transportation Company in this court, and to answer the damages which may be awarded to the libellant for the causes aforesaid.

And that this court would be pleased to pronounce for the libellant and decree payment of the damages aforesaid, with interest thereon

from the 19th day of August, 1874, with costs; and that libellant may have such other and further relief as to law and justice may appertain.

THE PHŒNIX INSURANCE COMPANY
OF BROOKLYN,
By VAN DYKE & VAN DYKE, *Proctors.*

VAN DYKE & VAN DYKE,
Libellant's Proctors.

STATE OF NEW YORK, }
County of New York, } *ss:*

On the seventh day of August, A. D. 1877, before me, a notary public in and for said State, came William R. Crowell, and being duly sworn, on his oath says that he is an officer, viz., secretary of the Phœnix Insurance Company of Brooklyn, the libellant named in the foregoing libel; that he makes this verification on behalf of said libellant, and is duly authorized thereto; that he is familiar with the facts set forth in said libel, and that the same are true to the best of his knowledge, information, and belief.

WM. R. CROWELL.

Subscribed and sworn to before me, this seventh day of August, A. D. 1877.

[SEAL.] FRANCIS P. BURKE,
Notary Public, New York Co.

And same day (August 20th, 1877,) affidavit of Wm. R. Crowell filed, as follows:

Affidavit of Wm. R. Crowell.

District Court of the United States, Eastern District of Wisconsin.
In Admiralty.

STATE OF NEW YORK, }
County of New York, } *ss:*

On this seventh day of August, A. D. 1877, before me, a notary public in and for said county and State, came William R. Crowell, of the city of New York, in said county and State, and being duly sworn, on his oath says that he is an officer, viz., secretary of the Phœnix Insurance Company of Brooklyn, the libellant in the above-entitled cause, and that he makes this affidavit on behalf of said libellant, and is duly authorized thereto.

That the Erie & Western Transportation Company, the respondent in the above-entitled cause, is a body coporate, created by the laws of the State of Pennsylvania.

That the Erie & Western Transportation Company, aforesaid, is indebted to the Phœnix Insurance Company of Brooklyn in a sum
7 exceeding five hundred dollars, to wit, in the sum of nine thousand two hundred and forty-eight dollars, with interest thereon from the 19th day of August, A. D. 1874, upon contract, civil and maritime, over and above all offsets.

That the Erie & Western Transportation Company is a corporation foreign to the eastern district of Wisconsin, and to the best knowledge, information, and belief is not now a resident within said eastern districts of Wisconsin.

That deponent is informed and believes that said Erie & Western Transportation Company is possessed of and owns certain personal property now within said eastern district of Wisconsin.

WM. R. CROWELL.

Subscribed and sworn to before me, this seventh day of August, A. D. 1877.

[SEAL.] FRANCIS P. BURKE,
Notary Public, New York Co.

Order for Process, &c.

Whereupon, on reading and filing the verified libel in this cause, together with the accompanying affidavit, it is ordered by this court that process issue to the marshal, returnable on the tenth day of September next, at eleven o'clock in the forenoon, with an attachment clause therein against the property of the respondent to the amount of $9,248, with interest from August 19, 1874, as prayed in said libel, on filing usual stipulation.

August 21, 1877. This day came the libellant and filed its stipulation for the payment of costs, with Robt. P. Fitzgerald as surety, in the sum of two hundred and fifty dollars, conditioned that the libellant above named shall abide by the final decree entered in this cause, and shall pay such costs as shall be awarded against it by this court, or in case of appeal, by the appellate court, as follows:

District Court of the United States for the Eastern District of Wisconsin.

Whereas a libel was filed in this court on the twentieth day of August, in the year of our Lord one thousand eight hundred and seventy-seven, by the Phœnix Insurance Company of Brooklyn, libellant, against Erie & Western Transportation Company, respondent, for the reasons and causes in the said libel mentioned, and praying that process in due form of law may issue against said respondent, and the party hereto hereby consenting and agreeing that in case of default or contumacy on the part of the libellant or its surety, execution may issue against its goods, chattels, and lands, for the sum of two hundred and fifty dollars:

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulator undersigned shall be, and is bound, in the sum of two hundred and fifty dollars, conditioned that the libellant above named shall abide by the final decree entered in the cause, and shall pay all such costs as shall be awarded against it by this court, or in case of appeal, by the appellate court.

THE PHŒNIX INSURANCE COMPANY
OF BROOKLYN,
By VAN DYKE & VAN DYKE, *Their Proctors.*
ROBT. P. FITZGERALD.

Taken and acknowledged, this 21st day of August, 1877, before me.

EDWARD KURTZ,
U. S. Commissioner.

EASTERN DISTRICT OF WISCONSIN, *ss:*

Robt. P. Fitzgerald, party to the above stipulation, being
8 duly sworn, deposes and says, that he is worth the sum of five hundred dollars, over and above all his just debts and liabilities.

ROBT. P. FITZGERALD.

Sworn to, this 21st day of August, 1877, before me.

EDW. KURTZ,
U. S. Commissioner.

Whereupon a monition, with attachment clause, issued, as follows:

Monition.

EASTERN DISTRICT OF WISCONSIN, *ss:*

[SEAL.] The President of the United States of America to the marshal of the eastern district of Wisconsin, Greeting:

Whereas a libel has been filed in the district court of the United States for the eastern district of Wisconsin on the 20th day of August, A. D 1877, by the Phœnix Insurance Company, of Brooklyn, against The Erie and Western Transportation Company, a body corporate, created by the laws of the State of Pennsylvania, in a certain cause of action, civil and maritime, on contract, and praying that process in due form of law, according to the rules and practice of said district court in causes of admiralty and maritime jurisdiction, may issue against said Erie and Western Transportation Company, and against any personal property to said Erie and Western Transportation Company belonging, within said district, and that the said property or any part thereof, may be attached and held to enforce the appearance of said Erie and Western Transportation Company in this court and to answer the damages which may be awarded to the libellant for the causes in said libel mentioned:

Now, therefore, we do command you, the said marshal, that you cite and admonish the said Erie and Western Transportation Company, if it shall be found within the jurisdiction of said court, that it be and appear before said district court, to be held in and for said eastern district of Wisconsin, on the tenth day of September, A. D. 1877, at eleven o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to answer the said libel, and to make its allegations in that behalf; and if the said Erie and Western Transportation Company cannot be found within your said district, that you attach its goods and chattels to the amount of nine thousand two hundred and forty-eight dollars, with interest from the 19th day of August, 1874, the amount sued for in said action.

And what you shall have done in the premises do you then and there make return thereof, together with this writ.

Witness the Honorable Charles E. Dyer, judge of the district court of the United States for the eastern district of Wisconsin, at the city of Milwaukee, in said district, on the 21st day of August, in the year of our Lord one thousand eight hundred and seventy-seven, and of our Independence the one hundred and second.

EDWARD KURTZ, *Clerk.*

VAN DYKE & VAN DYKE,
Proctors for Libellant.

9 *Return to Monition.*

Monition returned. In obedience to this writ, I have this twenty-seventh day of August, A. D. 1877, attached the steamer "Alaska," together with her engines, boilers, boats, tackle, apparel, and furniture, and hold her in custody in charge of a custodian.

HENRY FINK, *Marshal,*
Fee, $56.80. By W. A. NOWELL, *Deputy.*

August 28, 1877. This day came the Erie & Western Transportation Company, by its proctors, Messrs. Finches, Lynde & Miller, and filed its protest and claim, as follows:

Claim and Protest.

United States District Court, Eastern District of Wisconsin.

And now comes the said The Erie and Western Transportation Company, by D. M. Brigham, its general agent at this port, and claims the steamer Alaska, now in the custody of the marshal in this district, under process of attachment in the above entitled suit as its property, and the said Erie and Western Transportation Company alleges that at the time of the seizure of said steamer upon said process it was and yet is the true, sole, and lawful owner and proprietor, *bona fide* of the said steamer, her boats, tackle, apparel, and protesting against issuing of the process in manner and form, (this appearance being special, not general, and not confessing the jurisdiction of this court, but appearing merely for the purpose of protesting against the said process and service, and procuring the release of said steamer from said illegal seizure,) as the same has been issued and served in the case of the libel and complaint of The Phœnix Insurance Company of Brooklyn against the said The Erie and Western Transportation Company, says that The Erie and Western Transportation Company is a body corporate, incorporated under and by virtue of an act of the Legislature of the State of Pennsylvania, and is an inhabitant of the said State of Pennsylvania, and is not an inhabitant of the State and eastern district of Wisconsin, in which said suit is pending.

That this honorable court has no cognizance of or jurisdiction over said corporation, or the subject-matters alleged in said libel filed by said libellant, to compel or require the said defendant to appear, plead, or answer to the said libel or complaint; and that the district court for the eastern district of Wisconsin has no jurisdiction to proceed against the defendant, The Erie and Western Transportation Company, or its property, in this cause.

Wherefore the said The Erie and Western Transportation Company pray that this honorable court will be pleased to pronounce against the libel filed in said cause, the process and the service thereof and all proceedings therein, and said libel may be dismissed.

THE ERIE & WESTERN TRANS. CO.,
By D. M. BRIGHAM, *Agent.*
FINCHES, LYNDE & MILLER, *Proctors.*

We enter our appearance for the above claimants subject to above protest.

FINCHES, LYNDE & MILLER, *Proctors.*

August 28, 1877. This day came The Erie & Western Transportation Company, claimant of said steamer Alaska, and pre-
10 sented its stipulation in the sum of two hundred and fifty dollars, with Daniel M. Brigham as surety, conditioned that said claimant shall abide and answer the decree of the said court in the aforesaid cause as to costs, as follows:

Claimant's Stipulation for Payment of Costs.

District Court of the United States for the Eastern District of Wisconsin. In Admiralty.

Whereas a libel was filed on the 20th day of August, in the year of our Lord one thousand eight hundred and seventy-seven, by The Phœnix Insurance Company of Brooklyn against The Erie and Western Transportation Company, for the reasons and causes in the said libel mentioned; and whereas the propeller Alaska, her engines, &c., has been attached, and is in the custody of the marshal, under the process issued in pursuance of the prayer of said libel, as appears from the monition now on file in said court;

Appearing personally The Erie and Western Transportation Company as the claimant of the said propeller Alaska, her engines, &c., and produced for surety Daniel M. Brigham, and the said Daniel M. Brigham and Erie and Western Transportation Co., submitting themselves to the jurisdiction of the court, bound themselves, their heirs, executors, and administrators, in the sum of two hundred and fifty dollars unto the said The Phœnix Insurance Company of Brooklyn, that the said The Erie and Western Transportation Company shall abide and answer the decree of the said court, in the aforesaid cause, as to costs; and unless it shall so do, they do hereby severally consent that execution shall issue forth against them, their heirs, executors, and administrators, goods and chattels, lands and tenements, wheresoever the same may be found, to the value of the sum above mentioned.

THE ERIE & WESTERN TRANSPORTATION CO.,
By D. M. BRIGHAM, *Agent.*
D. M. BRIGHAM.

Taken and acknowledged, this 28th day of August, 1877, before me.

EDWARD KURTZ,
U. S. Commissioner, E. Dist. Wisconsin.

EASTERN DISTRICT OF WISCONSIN, *ss*:

D. M. Brigham, party to the above stipulation, being duly sworn, deposes and says: That he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

D. M. BRIGHAM.

Sworn to, this 28th day of August, 1877, before me.

EDWARD KURTZ,
U. S. Commissioner, E. Dist. Wisconsin.

And same day (August 28, 1877) came the said claimant and presented its stipulation in the sum of sixteen thousand dollars, with Daniel M. Brigham as surety, conditioned that the said Erie & Western Transportation Company shall abide all orders interlocutory or final of said court, and pay the amount awarded by the final decree rendered in the said court, or in any appellate court, as follows:

Claimant's Stipulation to Answer Decree.

District Court of the United States for the Eastern District of Wisconsin.

On the 28th day of August, A. D. 1877, before Edward
11 Kurtz, a commissioner duly appointed to take acknowledgments of bail, affidavits, and depositions, &c., within the eastern district of Wisconsin.

The Phœnix Insurance Company of Brooklyn against The Erie and Western Transportation Company, in a cause of contract, civil and maritime, moved and prosecuted in the district court of the United States for the aforesaid district.

Which day appeared personally the above named The Erie and Western Transportation Company, by D. M. Brigham, its agent, and produced for surety Daniel M. Brigham, of the city of Milwaukee, in the State of Wisconsin.

And the said The Erie and Western Transportation Company and Daniel M. Brigham, submitting themselves to the jurisdiction of the aforesaid court, bound themselves, their heirs, executors, and administrators, in the sum of sixteen thousand dollars unto the said Phœnix Insurance Company of Brooklyn, that the said Erie and Western Transportation Company shall abide all orders interlocutory or final of said court, and pay the amount awarded by the final decree rendered in the said court, or in any appellate court; and unless it shall do so, they do hereby severally consent that execution shall issue forth against them, their heirs, executors, and administrators, goods and chattels, wheresoever the same may be found, to the value of the sum above mentioned.

THE ERIE & WESTERN TRANSPORTATION COMPANY,
By D. M. BRIGHAM, *Agent.*
D. M. BRIGHAM.

Taken and acknowledged this 28th day of August, A. D. 1877, before me.

EDWARD KURTZ,
U. S. Commissioner, Eastern District of Wisconsin.

Daniel M. Brigham, party to the above stipulation, being duly sworn, deposes and says: That he is worth the sum of sixteen thousand dollars over and above all his just debts and liabilities and property exempt from sale and execution.

DANIEL M. BRIGHAM,

Subscribed and sworn to before me, this 28th day of August, A. D. 1877.

EDWARD KURTZ,
U. S. Commissioner.

Whereupon it is ordered by the court that the attachment heretofore granted herein be, and hereby is, dissolved, and that a warrant of restitution be issued to release the propeller Alaska from custody, and return the same to the claimant.

Warrant issued as follows:

Warrant of Restitution.

EASTERN DISTRICT OF WISCONSIN, *ss:*

[SEAL.] The President of the United States of America to the marshal of the eastern district of Wisconsin, Greeting:

Whereas a libel has been filed in the district court of the United States for the eastern district of Wisconsin on the 20th day of August, in the year of our Lord one thousand eight hundred and seventy-seven, by The Phœnix Insurance Company of Brooklyn, against The Erie & Western Transportation Company; and whereas the propeller Alaska, her engines, &c., has been attached by the process of the said court in pursuance of the prayer of the libel, and is now in your custody in virtue of said process; and whereas
12 also, a claim has been interposed and filed in said court by The Erie & Western Transportation Company, and such proceedings have been thereupon had that by the sentence and decree of said court in this cause, made and pronounced on the 28th day of August, 1877, the said propeller Alaska, her engines, &c., was adjudged to belong as claimed, and was ordered to be restored to the said claimant: Therefore, you, the said marshal, are hereby commanded to release the said propeller Alaska, her engines, &c., from arrest, and to deliver and return the same unto the said The Erie & Western Transportation Company.

And what you have done in the premises do you make return thereof before the said court of admiralty on the tenth day of September next, at eleven o'clock in the forenoon of said day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, together with this writ.

Witness the Honorable Charles E. Dyer, judge of the district court of the United States of America for the eastern district of Wisconsin,

at the city of Milwaukee, in said district, this twenty-eighth day of August, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of these United States the one hundred and second.

EDWARD KURTZ, *Clerk.*

Return to Warrant of Restitution.

Warrant of restitution returned. Served by releasing the steamer Alaska from custody, this 28th day of August, A. D. 1877.

HENRY FINK, *U. S. Marshal,*

Fees, $2.00. By W. A. NOWELL, *Deputy.*

September 28, 1877. This day came the respondent, The Erie & Western Transportation Company, by its proctors, Messrs. Finches, Lynde & Miller, and filed its answer, as follows:

Answer.

In Admiralty.

THE PHŒNIX INSURANCE COMPANY OF BROOKLYN, Libellant,

against

THE ERIE AND WESTERN TRANSPORTATION COMPANY, Respondent.

To the Hon. Charles E. Dyer, judge of the district court of the United States for the eastern district of Wisconsin:

The said respondent answers the libel of the said libellant against the said respondent, as follows:

First. The respondent does not know as to any of the matters therein alleged, and therefore does not admit any, and demands proof of every allegation in the first article of the said libel contained.

Second. The respondent admits the allegations of the second article of the said libel to be true.

Third. The respondent admits the allegation of the third article of the said libel to be true.

Fourth. The respondent admits the allegations of the fourth article of the said libel to be true, except so far as said allegations state anything with respect to ports or places in Territories.

Fifth. The respondent admits that in the month of July, 1874, it was the owner of the propeller Merchant, in the fifth article of the said libel mentioned and employed her and other vessels
13 owned by the respondent, in carrying property upon the waters, and between the ports in said article mentioned. The respondent does not know as to any of the matters therein alleged, and does not admit any, and demands proof of every allegation in said article contained not hereinbefore expressly admitted to be true.

Sixth. The respondent admits and alleges that on the 24th day of July, 1874, it, the said respondent, made and entered into a certain contract, hereinafter in this answer more particularly mentioned, and that it never made any other or different contract or came under any other or different undertaking as to the corn in

said contract mentioned, or any part thereof, than that contained in said contract, and never came under any other duty as to the said corn, or any part thereof, than such as required the fulfilment on the part of the said respondent of its part of said contract; that when said contract was made the propeller Merchant was lying at the port of Chicago, in the State of Illinois, and bound on a voyage to the port of Erie, in the State of Pennsylvania; that the quantity of corn in said contract mentioned, in apparent sound and good condition, was received on board said propeller, to be carried on said propeller to said Erie, and that certain freight was to be paid for the carriage of said corn to and its ultimate delivery at Philadelphia. The said respondent does not know whoever owned said corn, or who caused the same to be shipped, or to whom the same was consigned, except as hereinafter appears from the copy of said contract, or that the said corn was ever in sound or good condition, and, therefore, does not admit, and demands proof of the allegations in the said libel as to the alleged ownership and soundness and condition of the corn in the sixth article of the said libel mentioned, and as to who caused the same to be shipped, and as to whom the same was consigned. The respondent admits that it was one of the conditions of the said contract that the said respondent should not be liable for loss or damage of or to said corn by fire, collision, or any danger of navigation while the said corn should be on any sea, bay, harbor, river, lake, or canal. The said respondent denies that the said corn was to be delivered for the shipper for transshipment. And the said respondent denies and demands proof of each allegation in the said article contained inconsistent with any matter in this article of this answer alleged.

Seventh. The said respondent does not know as to any of the matters therein alleged, and does not admit any, and demands proof of every allegation in the seventh article of said libel contained.

Eighth. The respondent admits that the said propeller left the port of Chicago, at or about twelve o'clock at night on the 24th day of July, 1874, and proceeded on her voyage with the corn aforesaid laden on board, and that the said respondent did not safely carry or transport the said corn in order or condition like to that in which it was when laden on said propeller, and admits that the said propeller was stranded or was upon rocks on the western shore of Lake Michigan, and that said corn was greatly damaged and partly lost. The said respondent denies that it was not prevented by the dangers of navigation while on Lake Michigan from so carrying and delivering said corn, but admits that it was not prevented from so doing by fire, collision, or any danger of navigation, while on any other water than said Lake Michigan. The said respondent denies that the said propeller was stranded or was upon rocks, or that said corn was damaged or partly lost by reason of the unseaworthiness of said propeller, or the unskillfulness, mismanagement, carelessness, and negligence of the said respondent, its officers, agents, and servants, or of any of them, or by reason of either or any of such alleged matters or causes, and the said respondent denies that any such

14 unseaworthiness, unskillfulness, mismanagement, carelessness,

or negligence ever existed, and denies each and every allegation in the eighth article of said libel contained not hereinbefore expressly admitted to be true.

Ninth. The respondent denies that there ever was any unseaworthiness or wrong as in the ninth article of said libel alleged, or that any such unseaworthiness or wrong ever existed, or that any loss or damage ever resulted therefrom.

The respondent does not know, and does not admit, that the corn in said article mentioned was ever abandoned by the firm in said article mentioned to the libellant, or that the libellant was compelled to pay, or did at any time pay to said firm, the sum of eight thousand dollars, or any other sum by reason of any alleged insurance in said article mentioned, and the said respondent does not admit, and demands proof of each allegation in said article contained, as to any alleged abandonment, compulsion, payment, or assurance.

Tenth. The respondent does not know and does not admit that the said firm ever owned said corn, or that the same was ever insured, as is in the tenth article of the said libel stated, or that said firm ever had any right or interest, or right of action in said article referred to, or that any such right, interest or right of action ever existed, or that said libellant by reason of the alleged premises in said article mentioned or otherwise ever became subrogated to any such alleged right, interest, or right of action, and the respondent does not admit, and demands proof of each allegation in the said article contained as to any such alleged ownership, insurance, rights, interests, or rights of action, or any of the same; and the said respondent denies that any such right, interest, or right of action, ever existed against the said respondent, and denies that the said libellant was ever subrogated to any right, interest, or right of action against the respondent.

Eleventh. The respondent admits and alleges that on the 24th day of July, 1874, it, the said respondent, made and entered into a certain contract, hereinafter in this answer more particularly mentioned, and that it never made any other or different contract, or came, under any other or different undertaking as to the corn, in said last mentioned contract mentioned, or any part thereof, than that contained in said contract; and never came under any other duty, as to the said corn, or any part thereof, than such as required the fulfillment on the part of said respondent of its part of said contract, that when said contract was made the propeller Merchant was lying at the port of Chicago, in the State of Illinois, and bound on a voyage to the port of Erie, in the State of Pennsylvania; that the quantity of corn in said contract mentioned, in apparent sound and good condition, was received on board said propeller to be carried to said Erie, and that certain freight was to be paid for the carriage of said corn to and its ultimate delivery at Bound Brook and Newark. The said respondent does not know who ever owned said corn, or who caused the same to be shipped, or to whom the same was consigned, except as hereinafter appears from the copy of said contract, or that the said corn was ever in sound or good condition, and therefore does not admit and demands proof of the allegations in

the said libel as to the alleged ownership, soundness, and condition of the corn, in the eleventh article of the said libel mentioned, and as to who caused the same to be shipped, and as to whom the same was consigned. The respondent admits that it was one of the conditions of the said contract that the said respondent should not be liable for loss or damage of or to said corn by fire, collision, or any dangers of navigation while the said corn should be on any sea, bay, harbor, river, lake, or canal. The said respondent denies that the said corn was to be delivered for the shipper for transshipment.

And the said respondent denies and demands proof of each
15 allegation in the said article contained inconsistent with any matter in this article of this answer alleged.

Twelfth. The said respondent does not know as to any of the matters therein alleged, and does not admit any, and demands proof of every allegation in the twelfth article of said libel contained.

Thirteenth. The respondent admits that the said propeller left the port of Chicago at or about twelve o'clock at night of the 24th day of July, 1874, and proceeded on her voyage with the last mentioned corn laden on board, and that the said respondent did not safely carry or transport the said corn in order or condition like to that in which it was when laden on said propeller, and admits that the said propeller was stranded, or was upon rocks, upon the western shore of Lake Michigan, and that said corn was greatly damaged and partly lost. The said respondent denies that it was not prevented by the dangers of navigation, while on Lake Michigan, from so carrying and delivering said corn, but admits that it was not prevented from so doing by fire, collision, or any danger of navigation while on any other water than said Lake Michigan. The said respondent denies that the said propeller was stranded or was upon rocks, or that said corn was damaged, or partly lost by reason of the unseaworthiness of said propeller, or the unskillfulness, mismanagement, carelessness, and negligence of the said respondent, its officers, agents, and servants, or of any of them, or by reason of either or any of such alleged matters or cause; and the said respondent denies that any such unseaworthiness, unskillfulness, mismanagement, carelessness, or negligence ever existed, and denies each and every allegation in the thirteenth article of said libel contained, not hereinbefore expressly admitted to be true.

Fourteenth. The respondent denies that there ever was any unseaworthiness or wrong, as in the fourteenth article of said libel alleged, or that any such unseaworthiness or wrong ever existed, or that any loss or damage ever resulted therefrom. The respondent does not know, and does not admit, that the corn in said article mentioned was ever abandoned by the firm in said article mentioned to the libellant, or that the libellant was compelled to pay, or did at any time pay, to said firm the sum of five hundred and forty-eight dollars, or any other sum, by reason of any alleged insurance in said article mentioned, and the said respondent does not admit and demands proof of each allegation in said article mentioned, as to any alleged abandonment, compulsion, payment or assurance.

Fifteenth. The respondent does not know, and does not admit, that the said firm ever owned said corn, or that the same was ever insured, as is in the fifteenth article of said libel stated, or that said firm ever had any right or interest or right of action in said article referred to, or that any such right, interest, or right of action ever existed, or that said libellant by reason of the alleged premises in said article mentioned, or otherwise, ever became subrogated to any such alleged right, interest, or right of action, and the respondent does not admit and demands proof of each allegation in the said article contained, as to any such alleged ownership, insurance, right, interest, or right of action, or any of the same; and the said respondent denies that any such interest or right of action ever existed against the said respondent, and denies that the said libellant was ever subrogated to any right, interest, or right of action against the respondent.

Sixteenth. The respondent admits and alleges that on the 24th day of July, 1874, it, the said respondent, made and entered into a certain contract hereinafter in this answer more particularly mentioned, and that it never made any other or different contract, or came under any other different undertaking, as to the oats
16 and corn in said last mentioned contract mentioned, or any part thereof, than that contained in said contract, and never came under any other duty as to the said oats and corn, or any part thereof, than such as required the fulfillment on the part of said respondent of its part of said contract; that when said contract was made the propeller Merchant was lying at the port of Chicago, in the State of Illinois, and bound on a voyage to the port of Erie, in the State of Pennsylvania; that the quantity of oats and corn in said contract mentioned, in apparent sound and good condition, was received on board said propeller, to be carried to said Erie, and that certain freight was to be paid for the carriage of said oats and corn to and their ultimate delivery at Tamaqua.

The said respondent does not know who ever owned said corn, or who caused the same to be shipped, or to whom the same was consigned, except as hereinafter appears from the copy of said contract, or that the said oats and corn were ever in a sound or good condition, and therefore does not admit and demands proof of the allegations in said libel as to the alleged ownership and soundness and condition of the oats and corn in the sixteenth article of said libel mentioned, and as to who caused the same to be shipped, and as to whom the same were consigned. The respondent admits that it was one of the conditions of the said contract that the said respondent should not be liable for loss or damage of or to said oats or corn by fire, collision, or any danger of navigation while the said coats and corn should be on any sea, bay, harbor, river, or canal. The said respondent denies that the said oats and corn were to be delivered for the shipper for transshipment. And the said respondent denies and demands proof of each allegation in the said article contained inconsistent with any matter in this article of this answer alleged.

Seventeenth. The said respondent does not know as to any of the

matters therein alleged, and does not admit any, and demands proof of every allegation in the seventeenth article of said libel contained.

Eighteenth. The respondent admits that the said propeller left the port of Chicago at or about twelve o'clock at night of the 24th day of July, 1874, and proceeded on her voyage with the oats and corn last aforesaid laden on board, and that the said respondent did not safely carry or transport the said oats and corn in order or condition like to that in which it was when laden on said propeller, and admits that the said propeller was stranded, or was upon rocks upon the western shore of Lake Michigan, and that said oats and corn were greatly damaged and partly lost. The said respondent denies that it was not prevented by the dangers of navigation, while on Lake Michigan, from so carrying and delivering said oats and corn, but admits that it was not prevented from so doing by fire, collision, or any danger of navigation while on any other water than said Lake Michigan. The said respondent denies that the said propeller was stranded or was upon rocks, or that said oats and corn were damaged or partly lost by reason of the unseaworthiness of said propeller, or the unskillfulness, mismanagement, carelessness, and negligence of the said respondent, its officers, agents, and servants, or any of them, or by reason of either of any of such alleged matters or causes, and the said respondent denies that any such unseaworthiness, unskillfulness, mismanagement, carelessness, or negligence ever existed, and denies each and every allegation in the eighteenth article of said libel contained not hereinbefore expressly admitted to be true.

Nineteenth. The respondent denies that there ever was any unseaworthiness or wrong, as is in the nineteenth article of said libel alleged, or that any such unseaworthiness or wrong ever existed, or that any loss or damage ever resulted therefrom. The re-
17 spondent does not know, and does not admit, that the oats and corn in said article mentioned were ever abandoned by the firm in said article mentioned to the libellant, or that the libellant was compelled to pay, or did at any time pay, to said firm the sum of seven hundred dollars, or any other sum, by reason of any alleged insurance in said article mentioned, and the said respondent does not admit any, and demands proof of each allegation in said article contained as to any alleged abandonment or compulsion, payment or assurance.

Twentieth. The respondent does not know, and does not admit, that the said firm ever owned said oats and corn, or that the same were ever insured, as is in the twentieth article of the said libel stated; or that said firm ever had any right, or interest, or right of action in said article referred to, or that any such right, interest, or right of action ever existed, or that said libellant, by reason of the alleged premises in said article mentioned, or otherwise, ever became subrogated to any such alleged right, interest, or right of action, and the respondent does not admit and demands proof of each allegation in the said article contained as to any such alleged ownership, insurance, right, interest, or right of action, or any of the same, and the said respondent denies that any such right, interest, or right of ac-

tion ever existed against the said respondent, and denies that the said libellant was ever subrogated to any right, interest, or right of action against the respondent.

Twenty-first. The respondent admits that a portion of the cargo of the said propeller on her said voyage was wholly lost, and that a portion thereof, to wit, five thousand one hundred and eighty-eight bushels of corn, was brought into the port of Milwaukee, in the State of Wisconsin, on or about the 31st day of July, 1874, in a wet, damaged, and perishable condition, and was unfit for transshipment, and was then and there sold for the sum of ten hundred and thirty-seven dollars and sixty cents, which proceeds of said sale were received by the said respondent, and which it now holds, and which it has offered, and has been, and is, willing to pay to the party or parties entitled to receive the same, and has been so willing to pay the same ever since the 2d day of September, 1874, when an adjustment was made of or as to the general average losses arising from the said propeller being on the rocks aforesaid. The respondent does not know as to any of the matters therein alleged, and does not admit any, and demands proof of every allegation in the twenty-first article of said libel contained not hereinbefore admitted to be true.

Twenty-second. The respondent does not know as to any of the matters therein alleged, and therefore does not admit any, and demands proof of every allegation in the twenty-second article of the said libel contained as to the respondent's owning or possessing any property within the admiralty or maritime jurisdiction of this court. The respondent admits the other allegations in the said article contained to be true.

Twenty-third. The respondent denies that all and singular the premises in the twenty-third article of said libel mentioned were or are true, and, on the contrary thereof, alleges that many matters and things in said libel contained are therein untruly alleged and pleaded. The said respondent, further answering said libel, states and alleges as follows:

Twenty-fourth. That heretofore, and on the 24th day of July, 1874, the said propeller Merchant, she then being in all respects seaworthy, and worthy and fit to undertake the trip or voyage hereinafter mentioned, and having skillful, competent, and sufficient officers and crew, and being then partly laden with property, parts of which was the grain in said libel mentioned, started on a trip or voyage from the port of Chicago, in the State of Illinois, to Erie, in the State of Pennsylvania, in and according to the regular course and custom of business; that the said propeller so left Chicago about twelve
18 o'clock at night of the day last aforesaid. In the morning of the next day the propeller was in a dense fog. About half-past nine o'clock of the same morning, the fog still prevailing, the propeller struck upon rocks, upon the west shore of Lake Michigan. That from the time when the said propeller so left Chicago, down to the time when the said propeller so struck, good, ample, and sufficient watch and lookout were kept on the said propeller, and good, ample, and proper vigilance, care, and skill employed and exercised with reference to the safety of the said propeller and her cargo, that

by and on account of the said propeller so striking as aforesaid she was caused to leak and part of her cargo became wet, and it became necessary to jettison a part of her cargo; and that by reason of said part of said cargo having become wet, and the jettison aforesaid, the loss and damage in said libel mentioned were caused; that the striking aforesaid and the said leaking, wetting of part of the cargo, loss, and damage aforesaid were by, and were caused by, the fog aforesaid, and perils of navigation, while the said cargo and said propeller were on Lake Michigan, and not wholly or in part by any fault, unseaworthiness, or unfitness upon the part of the said propeller, or any unskillfulness, incompetency, carelessness, mismanagement, negligence, or fault upon the part of those or of any of those engaged in the navigation of said propeller.

Twenty-fifth. That heretofore, to wit, on the 24th day of July, 1874, the said respondent made and entered into a certain contract for the transportation of a certain quantity of corn, the same being the quantity of corn in the sixth article of the said libel mentioned, a copy of which contract, except the signatures thereto, is hereto annexed, marked "A," and made a part hereof, within and whereby the said respondent contracted for certain freight hereinbefore mentioned to transport said corn from Chicago aforesaid to Philadelphia, in the State of Pennsylvania, and there to deliver the same, and that it was provided in, and was one of the terms and conditions of, the said contract that the said respondent should not be liable for any loss or damage to the said corn by fire, collision, or the dangers of navigation while on seas, bays, harbors, rivers, lakes, or canals, and that in case of any loss, detriment, or damage done to or sustained by the said corn during the transportation thereof from Chicago to Philadelphia as aforesaid, whereby any legal liability or responsibility should or might be incurred, that company only should be held answerable therefor in whose actual custody the same might be at the time of the happening of such loss, detriment, or damage, and the carrier so liable should have the full benefit of any insurance that might have been effected upon or on account of said corn.

Twenty-sixth. That the corn in the sixth article of the said libel mentioned was on said propeller, as hereinbefore stated, *to be transported thereon from Chicago to Erie aforesaid*, under and subject to the conditions and terms of said contract, and that the alleged loss or damage of or to the said last-mentioned quantity of corn in said libel mentioned was by, and was caused by, dangers of navigation when on Lake Michigan, as hereinbefore fully appears, and that therefore no action for or on account of the said last-mentioned loss or damage can be maintained.

Twenty-seventh. That at the time of the said alleged loss and damage of or to the said last-mentioned quantity of corn the same was in the actual custody of the said respondent, and the respondent was the carrier thereof, and that if any liability arose for or on account of the said loss or damage (the said respondent expressly denying that any such liability ever did arise), the said respondent was the company and carrier alone answerable and liable therefor, and that therefore, and by reason of the express provisions of the said

last-mentioned contract, the said respondent was and is entitled to, and at the time of the filing of the said libel had the full benefit of, the insurance mentioned in the seventh article of the said libel, if any such insurance was ever made; and that therefore no action can be maintained by the said libellant against the said respondent for or on account of the last-mentioned loss or damages.

19

Twenty-eighth. That heretofore, and on the 24th day of July, 1874, the said respondent made and entered into a certain contract for the transportation of a certain quantity of corn, the same being the quantity of corn in the eleventh article of the said libel mentioned, a copy of which contract, except the signatures thereto, is hereto annexed, marked "B," and made a part hereof, wherein and whereby the said respondent contracted for certain freight, hereinbefore mentioned, to transport four hundred bushels of said last-mentioned corn from Chicago aforesaid to Bound Brook, in the State of New Jersey, and there to deliver the same, and four hundred bushels of said last-mentioned corn from Chicago aforesaid to Newark, in the State of New Jersey, and there to deliver the same, and that it was provided in, and one of the terms and conditions of, the said contract that the said respondent should not be liable for any loss or damage to the said corn in this article of this answer mentioned by fire, collision, or the dangers of navigation while on seas, bays, harbors, rivers, lakes, or canals; and that in case of any loss, detriment, or damage done to or sustained by the said last-mentioned corn during the transportation thereof from Chicago to Bound Brook and Newark, respectively, aforesaid, whereby any legal liability or responsibility should or might be incurred, that company only should be held answerable therefor in whose actual custody the same might be at the time of the happening of such loss, detriment, or damage; and the carrier so liable should have the full benefit of any insurance that might have been effected upon or on account of said last-mentioned corn.

Twenty-ninth. That the corn in the eleventh article of the said libel mentioned was on said propeller, as hereinbefore stated, four hundred bushels thereof to be transported thereon from Chicago to Bound Brook aforesaid, and four hundred bushels thereof to be transported thereon from Chicago to Newark aforesaid, under and subject to the conditions and terms of said contract, and that the alleged loss or damage of or to the said corn in said libel mentioned was by, and was caused by, dangers of navigation when on Lake Michigan, as hereinbefore fully appears, and that therefore no action for or on account of the said last-mentioned loss or damage can be maintained.

Thirtieth. That at the time of said alleged loss and damage of or to the said last-mentioned corn the same was in the actual custody of the said respondent, and the respondent was the carrier thereof, and that if any liability arose from or on account of the said loss or damage (the said respondent expressly denying that any such liability ever did arise) the said respondent was the company and carrier alone answerable and liable therefor, and that therefore, and by

reason of the express provisions of the said last-mentioned contract the said respondent was and is entitled to, and at the time of the filing of the said libel had, the full benefit of the insurance mentioned in the twelfth article of the said libel, if any such insurance was ever made, and that therefore no action can be maintained by the said libellant against the said respondent for or or account of the said last-mentioned loss or damages.

Thirty-first. That heretofore, and on the 24th day of July, 1874, the said respondent made and entered into a certain contract for the transportation of a certain quantity of oats and corn, the same being the quantity of oats and corn in the sixteenth article of the said libel mentioned, a copy of which contract, except the signature thereto, is hereto annexed, marked "C," and made a part hereof, wherein and whereby the said respondent contracted for certain freight hereinbefore mentioned, to transport said oats and corn last
20 mentioned from Chicago aforesaid to Tamaqua, in the State of Pennsylvania, and there to deliver the same; and that it was provided in, and was one of the terms and conditions of, the said last-mentioned contract that the said respondent should not be liable for any loss or damage to the said oats and corn last mentioned by fire, collision, or the dangers of navigation while on seas, bays, harbors, rivers, lakes, or canals, and that in case of any loss, detriment, or damage done to or sustained by the said oats and corn last mentioned, during the transportation thereof from Chicago to Tamaqua, as aforesaid, whereby any legal liability or responsibility should or might be incurred, that company only should be held answerable therefor in whose actual custody the same might be at the time of the happening of such loss, detriment, or damage, and the carrier so liable should have the full benefit of any insurance that might have been effected upon or on account of said oats and corn last mentioned.

Thirty-second. That the oats and corn in the sixteenth article of the said libel mentioned were on said propeller, as hereinbefore stated, to be transported thereon from Chicago to Tamaqua, aforesaid, under and subject to the conditions and terms of said last-mentioned contract, and that the alleged loss or damage of or to the said quantity of oats and corn, last mentioned in said libel mentioned, was by, and was caused by, dangers of navigation when on Lake Michigan, as hereinbefore fully appears, and that therefore no action for or on account of the said last-mentioned loss or damages can be maintained.

Thirty-third. That at the time of the said alleged loss and damage of or to the said quantity of oats and corn last mentioned the same were in the actual custody of the said respondent, and the respondent was the carrier thereof, and that if any liability arose for or on account of the said loss or damage (the said respondent expressly denying that any such liability ever did arise) the said respondent was the company and carrier alone answerable and liable therefor, and that therefore, and by reason of the express provisions of the said last-mentioned contract, the said respondent was and is entitled to, and at the time of the filing of the said libel had,

the full benefit of the insurance mentioned in the seventeenth article of the said libel, if any such insurance was ever made, and that, therefore, no action can be maintained by the said libellant against the said respondent for or on account of the last-mentioned loss or damage.

Thirty-fourth. That, in and by the contract mentioned in the twenty-fifth article of this answer, the said respondent contracted to transport said property in said article mentioned from Chicago to Philadelphia, as in said article appears, and so to transport the same by steamboats, railroad companies, and forwarding lines in said contract mentioned, until it reached Philadelphia aforesaid; that it was understood and agreed by the parties with whom the said respondent contracted, and the course of trade and business required, that part of the transportation of the said last-mentioned property, to wit, from Erie, aforesaid, to Philadelphia, aforesaid, should be performed on land and by means of railroad cars, and that, therefore, any alleged cause of action in said libel mentioned, for any loss or damage to said last-mentioned property, if any such cause of action ever arose, is and was not a cause of admiralty or maritime jurisdiction, and that, therefore, this action cannot be maintained for or on account of said last-mentioned loss or damage.

Thirty-fifth. That, in and by the contract mentioned in the twenty-eighth article of this answer, the said respondent contracted to transport said property in said article mentioned from
21 Chicago to Bound Brook and Newark, aforesaid, as in said article appears, and so to transport the same by steamboats, railroad companies, and forwarding lines in said contract mentioned, until it reached Bound Brook and Newark, aforesaid; that it was understood and agreed by the parties with whom the said respondent contracted, and the course of trade and business required, that part of the transportation of the said last-mentioned property, to wit, from Erie, aforesaid, to Bound Brook and Newark, aforesaid, should be performed on land and by means of railroad cars, and that, therefore, any alleged cause of action in said libel mentioned, for any loss or damage to said last-mentioned property, if any such cause of action ever arose, is and was not a cause of admiralty or maritime jurisdiction, and that, therefore, this action cannot be maintained for or on account of said last-mentioned loss or damage.

Thirty-sixth. That, in and by the contract mentioned in the thirty-first article of this answer, the said respondent contracted to transport said property in said article mentioned from Chicago to Tamaqua, aforesaid, as in said article appears, and so to transport the same by steamboats, railroad companies, and forwarding lines in said contract mentioned, until it reached Tamaqua, aforesaid; that it was understood and agreed by the parties with whom the said respondent contracted, and the course of trade and business required, that part of the transportation of the said last-mentioned property, to wit, from Erie, aforesaid, to Tamaqua, aforesaid, should be performed on land and by means of railroad cars, and that, therefore, any alleged cause of action in said libel mentioned, for any loss or damage to said last-mentioned property, if any such cause of

action ever arose, is and was not a cause of admiralty or maritime jurisdiction, and that, therefore, this action cannot be maintained for or on account of said last-mentioned loss or damage.

Thirty-seventh. That the said respondent is, and at the time of filing of the libel in this action was, a corporation duly created and existing under the laws of the State of Pennsylvania, and is not, and at the time of filing said libel was not, an inhabitant of the eastern district of Wisconsin, and has not been, and never could be, found in said district within the intent and meaning of section seven hundred and thirty-nine, part of chapter twelve of title thirteen, of the Revised Statutes of the United States.

That upon the prayer of the said libellant, in the said libel, process of warrant and attachment against the goods and chattels of the said respondent was issued to the marshal of the district aforesaid, and that thereunder the said marshal seized and took the propeller "Alaska," her tackle, apparel, and furniture, then the property of the said respondent, and which the said respondent then employed in its business, and which then were of the value of fifty thousand dollars and upwards; that this court, at that time, for the reason that said respondent was not then an inhabitant of the said district, and, as aforesaid, could not be found therein, had no jurisdiction of any action for any alleged losses or damages in said libel mentioned; that the said marshal and the said libellant, although this court had no jurisdiction, as aforesaid, insisted upon retaining the possession, under said warrant, of the said property so seized and attached; that great damage would have been caused to the said respondent, had such possession been maintained; that, in order to avoid said damage, and under the duress of its said property under said warrant, and not voluntarily, and protesting and claiming that this court had no jurisdiction, and that said process should not have been issued, the said respondent appeared especially, and not generally, and praying, protesting, and claiming, and so appearing (and only appearing), as appears from its claim, protest, and appearance on file with the clerk of this court, to which reference is hereby made, and so appearing for the purpose of procuring the re-
22 lease of said property from said seizure, and not voluntarily, and under the duress aforesaid, and also to avoid the damage, and for the purpose aforesaid, caused two stipulations to be filed—one as to costs, and another that the said respondent should abide all orders, interlocutory or final, of said court, and pay the amount awarded by the final decree rendered in the said court, or any appellate court, as by said stipulation now on file with the clerk of this court (to which the respondent hereby makes reference) will precisely and fully appear, and agreed to and with said libellant that it, the said respondent, would thereafter substitute, in the place of and as and for said last-mentioned stipulation, another bond or stipulation, with other sureties, or an additional surety, conditioned, or providing the same in substance, as the stipulation so as aforesaid given, that, without the giving of said stipulations so given, and said agreement so made, the said libellant would not, nor would said marshal, release said property so seized, and attached from

seizure, and arrest under said warrant, and that upon the giving said stipulations so given, and the making of said agreement, said property, so seized and attached, was released from said seizure and arrest; and hereupon the respondent claims that this court has not, and ought not to retain, and prays it will not take or retain, jurisdiction of this action, and that, therefore, the said libel should be dismissed, and any bond or stipulation in this article of this answer mentioned decreed to be cancelled.

Thirty-eighth. That all and singular the matters alleged or stated in the foregoing answer are therein fully alleged and stated, and that the respondent does not know, and is unable to say, and, therefore, cannot say, whether or not any matter in said answer mentioned, as to which it is stated in said answer the said respondent does not know, is or was as is in said libel stated. The said respondent, therefore, does not admit any allegation in said libel contained of any matter as to which the said respondent as aforesaid says it does not know, and demands proof of every allegation in said libel contained not in this answer expressly admitted or stated to be true.

And hereupon the respondent prays that the libel in this action be dismissed, and for such further relief as it shall claim and shall be entitled to have.

THE ERIE & WESTERN TRANSPORTATION COMPANY,
By FINCHES, LYNDE & MILLER, *Proctors.*

FINCHES, LYNDE & MILLER,
Proctors for Respondents.

STATE OF NEW YORK, }
County of Erie, City of Buffalo, } *To wit:*

On this twenty-second day of September, 1877, before me, a notary public in and for said Erie county, came Edwin T. Evans, and being by me duly sworn on his oath, deposes and says: That he resides in the city of Buffalo; that he is an agent of the respondent in the foregoing answer mentioned, and was such agent of the respondent, and the manager of that part of its business which included the general management of the grain-carrying business of the said respondent on Lake Michigan, at all the times in the foregoing answer mentioned; that he has heard the said answer read and knows the contents thereof; that he is authorized to cause said answer to be put in; that he knows more of and as to the matters in the libel in said answer mentioned, and in said answer stated or referred
23 to, than any officer or other agent of the said respondent, and that the foregoing answer is true, to the best of the knowledge, information, and belief of the deponent.

(S'g.) EDWIN T. EVANS.

Subscribed and sworn to before me, this 22d day of September, A. D. 1877.

[SEAL.] (S'g.) ROBERT GIRVEN,
Notary Public in and for Erie County, N. Y.

EXHIBIT A.

Form No. 12—Chicago.

Anchor Line. Lake and Rail.

Via Erie and the Anchor Line steamers from all Lake Michigan ports.

The Erie & Western Transportation Company is the proprietor of the "Anchor Line" which issues this bill of lading, and is a corporation of the State of Pennsylvania, having a real capital. The "Anchor Line" is the authorized and exclusive agent of the Pennsylvania Railroad Co. for its lake business *via* the Philadelphia & Erie railroad and connections. It offers to the public a line of first-class propellers between the city of Erie and lake ports. Responsible through bills of lading and the shortest lake and rail line to the East.

JOHN E. PAYNE, Eastern Manager, Erie, Pa.
E. T. EVANS, Western Manager, Buffalo, N. Y.

Contents and value of packages unknown.

Information and rates may be obtained at—

Penn'a R. R. offices, No. 1 Astor House, N. Y.; No. 1 South William St., N. Y.; Empire Line office, 319 Broadway, N. Y.; Anchor Line offices, 148 Pearl street, piers 4 and 5, N. R., New York.

Penn'a R. R. office, 15th and Market Sts., Phila.; Anchor Line office, 42 S. 5th street, Phila.

Baltimore, 199 North street.
Erie, Anchor Line dock.
Detroit, foot of Woodward Ave.
Milwaukee, Anchor Line dock.
Port Huron, Michigan.
Bay City, Michigan.
Chicago, 52 La Salle street.
Boston, 77 Washington street.
Buffalo, Atlantic dock.

WM. F. GRIFFITTS, Jr., General Freight Agent, 1127 Girard street, Phila.

Rates from Chicago to Philadelphia @ 16c. per bushel.

If 1st class, per 100 lbs.
If 2d class, per 100 lbs.
If 3d class, per 100 lbs.
If 4th class, per 100 lbs.

No single package rated at less than 100 pounds.

Special rates, weight guaranteed.

☞ This receipt to be presented without alteration or erasure.

Received, Chicago, July 24, 1874, of A. M. Wright & Co., the following packages (contents unknown), in apparent good condition:

Marks.	Articles.
Order A. M. Wright & Co., Liverpool, Eng'd.	16,325.34 bush. corn.
Notify American Steamship Co., Philadelphia, Pa.	Prop. Merchant.

Marked and numbered as per margin, to be transported by the

Anchor Line, and the steamboats, railroad companies, and
24 forwarding lines with which it connects, until the said goods or merchandise shall have reached the point named in this bill of lading, on the following terms and conditions, viz:

That the said Anchor Line and the steamboats, railroad companies, and forwarding lines with which it connects, and which receive said property, shall not be liable for leakage of oils or any kinds of liquids, breakage of any kind of glass, earthen or queensware, carboys of acids, or articles packed in glass, stoves and stove furniture, castings, machinery, carriages, furniture, musical instruments of any kind, packages of eggs, or for rust of iron, and of iron articles, or for loss or damage by wet, dirt, fire, or loss of weight, or for condition of baling on hay, hemp, or cotton; nor for loss or damage of any kind on any article whose bulk requires it to be carried on open cars; nor for damage to perishable or other property of any kind, occasioned by delays from any cause or by changes of weather; nor for loss or damage on any article of property whatever by fire while in transit or while in depots, elevators, or places of transshipment, or at depots or landings at point of receipt or delivery; nor for loss or damage by fire, collision, or the dangers of navigation while on seas, bays, harbors, rivers, lakes, or canals. And where grain is shipped in bulk the said Anchor Line is hereby authorized to deliver the same to the Elevator Company at Erie, as the agent of the owner or consignee, for transshipment (but without further charge to such owner or consignee), into the cars of the connecting railroad companies or forwarding lines, and when so transshipped in bulk the said Anchor Line and the said connecting railroad company or carrier shall be and is, in consideration of so receiving the same for carriage, hereby exempted and released from all liability for loss, either in quantity or weight, and shall be entitled to all other exemptions and conditions herein contained. All goods or property under this bill of lading will be subject, at its owner's cost, to necessary cooperage or baling, and is to be transported to the depots of the companies or landings of the steamboats or forwarding lines at the point receipted to for delivery.

It is further agreed that unless this bill of lading, properly endorsed, be delivered to the agent of the Anchor Line at destination on or before the arrival there of the herein above-described property, the said company is authorized to deliver the said property to the consignee or to the party to whose care it is by this bill of lading consigned, and after such delivery the said company shall be no longer responsible for or on account of this bill of lading, or for or on account of any assignment of transfer thereof.

It is further agreed that the Anchor Line and the steamboats, railroads, and forwarding lines with which it connects shall not be held accountable for any damage or deficiency in packages, after the same shall have been receipted for in good order by consignees or their agents, at or by the next carrier beyond the point to which this bill of lading contracts. Consignees are to pay freight and charges upon the goods or merchandise, in lots or parts of lots, as they may be delivered to them. The goods transported shall be subject to a

lien, and may also be retained, for all arrearages of freight due on other goods by the same consignee or owners.

It is further stipulated and agreed that in case of any loss, detriment, or damage done to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment, or damage, and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods.

And it is further agreed that the amount of the loss or damage so accruing, so far as it shall fall upon the carriers above described, shall be computed at the value or cost of said goods or property at the place and time of shipment under this bill of lading.

This contract is executed and accomplished, and the liability of the companies as common carriers thereunder terminates, on the arrival of the goods or property at the station or depot of delivery (and the companies will be liable as warehousemen only thereafter), and unless removed by the consignee from the station or depots of delivery within 24 hours of their said arrival, they may be removed and stored by the companies at the owner's expense and risk.

NOTICE.—In accepting this bill of lading the shipper or other agent of the owner of the property carried expressly accepts and agrees to all its stipulations, exceptions, and conditions.

EXHIBIT B.

(Same as Exhibit A, except as follows:)

Rates from Chicago to Bound Brook and Newark, 17c. per bushel.

Received, Chicago, July 24, 1874, of Elmendorf & Co., 400 bushels corn.

Order Elmendorf & Co.

Notify Abm. Whitenack, Bound Brook, N. J., 400 bushels corn.

Order same.

Notify Wilkinson, Geddes & Co., Newark, N. J.

EXHIBIT C.

(Same as Exhibit A, except as follows:)

Rates from Chicago to Tamaqua, Pa., corn 17c., oats 11c., bushel.

Received, Chicago, July 24, 1874, of Gilbert Wolcott & Co.

689.02 bus. white oats.

370.30 bus. No. 2 corn.

Order Gilbert Wolcott & Co.

Notify Louis Buehler, Tamaqua, Pa.

PRO. MERCHANT.

25 November 28, 1877. This day came the claimant and filed its additional stipulation in the sum of sixteen thousand dollars, with Edwin T. Evans and Daniel M. Brigham as sureties, conditioned that it shall abide by all orders in the aforesaid cause, in-

terlocutory or final, of said court, and pay the amount awarded by the final decree in the aforesaid cause rendered in the said court or in any appellate court, as follows:

Additional Stipulation of Claimant to Answer Decree.

District Court of the United States for the Eastern District of Wisconsin.

THE PHŒNIX INSURANCE COMPANY OF BROOKLYN
against
THE ERIE AND WESTERN TRANSPORTATION COMPANY, in a cause of contract moved and prosecuted in the District Court of the United States.

The Erie and Western Transportation Company appears and produces for sureties Daniel M. Brigham and Edwin T. Evans, the said Daniel M. Brigham being of the city of Milwaukee, in the State of Wisconsin, and the said Edwin T. Evans being of the city of Buffalo, in the State of New York, and submitting themselves to the jurisdiction of the aforesaid court, bind themselves, their heirs, executors, and administrators, in the sum of sixteen thousand dollars unto the said Phœnix Insurance Company of Brooklyn, that the said The Erie and Western Transportation Company shall abide by all orders in the aforesaid cause, interlocutory or final, of said court, and pay the amount awarded by the final decree in the aforesaid cause rendered in the said court or in any appellate court, and unless it shall do so they do hereby severally consent that execution shall issue forth against them, their heirs, executors, and administrators, goods and chattels, wheresoever the same may be found, to the value of the sum above mentioned.

In witness whereof, the said The Erie & Western Transportation Company has hereunto set its corporate seal, and caused these presents to be subscribed by its president and secretary, and the said sureties have also subscribed the same.

THE ERIE & WESTERN TRANSPORTATION CO.,
By JOS. D. POTTS, *Pres.*
EDWIN T. EVANS.
D. M. BRIGHAM.

[SEAL.] Attest: GEO. B. BONNELL, *Sec'y.*

Taken and acknowledged by the Erie and Western Transportation Company before the subscriber, on this 21st day of September, 1877, and on this day personally appears before me Joseph D. Potts, who, being by me duly affirmed, affirms, deposes, and says: That he is the president and Geo. B. Bonnell is the secretary of the said company; that they both have officially subscribed the foregoing instrument as above appears; that they have affixed the corporate seal of the said company to the foregoing instrument as above appears, and that they were and are duly authorized so to do.

JOHN URIAN, [SEAL.]
Notary Public.

Taken as to Edwin T. Evans, named in the foregoing instrument, and acknowledged by him before me, this 25th day of September, 1877.

ROBERT GIRVEN,
Notary Public in and for Erie County, N. Y.

NORTHERN DISTRICT OF NEW YORK, } ss:
County of Erie, City of Buffalo, }

Edwin T. Evans, being duly sworn, deposes and says: That
26 he is worth the sum of sixteen thousand dollars over and above all his just debts and liabilities and property exempt from sale on execution.

EDWIN T. EVANS.

Subscribed and sworn before me, this 25th day of September, 1877.
[SEAL.] ROBERT GIRVEN,
Notary Public in and for Erie County, N. Y.

EASTERN DISTRICT OF WISCONSIN, *ss:*

Daniel M. Brigham, being duly sworn, deposes and says: That he is worth the sum of sixteen thousand dollars over and above all his just debts and liabilities and property exempt from sale on execution.

DANIEL M. BRIGHAM.

Subscribed and sworn to before me, this 28th day of September, A. D. 1877.

EDWARD KURTZ, *Clerk.*

March 8, 1878. Deposition of Charles E. Chase, received from W. J. C. Forster, U. S. commissioner, and filed.

August 1, 1878. Deposition of Valentine Jones filed.

October 7, 1878. This day came the parties by their counsel, and by consent it is ordered by the court that the respondent have until February 1st, 1879, to take its proofs, and that the libellant have until February 15th, 1879, to take its rebutting proofs, and that the cause be set for hearing on the said February 15th, 1879, that such proofs be taken upon the usual notice, and that the respondent be limited to taking the same at three places, to wit: Buffalo, Chicago, and Milwaukee, once only at each place, and by adjournment from day to day, at each place, until completed.

February 13, 1879. This day came the parties by their proctors and filed their stipulation that the time for hearing said cause be changed to the 26th day of March, 1879, and that the time wherein the respondent may take testimony therein at Chicago and Milwaukee, be extended to the first day of March, 1879, and the time wherein the libellant may take testimony therein be extended to the 25th day of March, 1879.

March 17th, 1879. Depositions received from post office, and filed.

March 20, 1879. Depositions on behalf of respondent received by

express, and filed; and, same day deposition on behalf of libellant received from post office, and filed.

March 31, 1879. Depositions of J. F. Trowell and J. H. Blend, on part of libellant filed.

July 30, 1879. This day came the parties by their proctors, Messrs. Van Dyke & Van Dyke, and Mr. N. J. Emmons appearing for the libellant, and Messrs. W. P. Lynde and Geo. B. Hibbard for the respondent, and this cause came on to be heard upon the pleadings and proofs, and was argued by said proctors; and the hearing not being concluded, the same was adjourned until to-morrow morning.

July 31, 1879. This day came the parties by their proctors, and the hearing of this cause was resumed; and not being concluded, the same was adjourned until to-morrow morning.

August 1, 1879. This day came the parties by their proctors, and the hearing of this cause was resumed; and not being concluded, the same was adjourned until to-morrow morning.

August 2, 1879. This day came the parties by their proctors, and the hearing of this cause was resumed; and being concluded, the court held the same under advisement.

26½ The respondent admits the first article of the libel to be true.

And now, at this same term, to wit, January term, 1880, and on the fourth day thereof, to wit, on the eighth day of January, A. D. 1880, the following proceedings were had, to wit:

Decree.

THE PHŒNIX INSURANCE COMPANY OF BROOKLYN
vs.
THE ERIE & WESTERN TRANSPORTATION COMPANY. } In Admiralty.

This day came the parties by their proctors, and this cause having been heretofore heard upon the pleadings and proofs and
27 held under advisement, and the court being now well and sufficiently advised of and concerning the same, it is considered and adjudged by this court now here that the libellant has, on a contract, civil and maritime, a demand against the respondent, The Erie and Western Transportation Company, to the amount of one thousand and thirty-seven dollars and sixty cents, with interest from September 2d, A. D. 1874, at seven per cent. per annum, amounting to three hundred and eighty-eight dollars and fifty-eight cents, making in all the sum of one thousand four hundred and twenty-six dollars and eighteen cents.

And it is further ordered, adjudged and decreed by the court that the said libellant do have and recover of the said respondent, The Erie and Western Transportation Company, and Edwin T. Evans and Daniel M. Brigham, its stipulators, the said sum of one thousand four hundred and twenty-six dollars and eighteen cents, and in default of payment of the same within ten days that said libellant have execution therefor.

And it is further ordered, adjudged, and decreed that each party do pay one-half the costs, taxed at two hundred and seventy-two dollars and fifty-five cents.

CHAS. E. DYER, *Judge.*

And came the libellant, by its proctors, in open court and prayed an appeal to the circuit court of the United States for this district.

Whereupon it is ordered by the court that said appeal be, and hereby is, allowed.

UNITED STATES OF AMERICA, }
Eastern District of Wisconsin, } *ss:*

I, Edward Kurtz, clerk of the district court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate with their originals now on file and remaining of record in my office, and that they are true copies of such originals and correct transcripts therefrom, being a transcript of the record and proceedings in the case of The Phœnix Insurance Company of Brooklyn against The Erie & Western Transportation Company.

In testimony whereof, I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in said district, this 24th day of April, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the 104th.

EDWARD KURTZ, *Clerk.*

28 *Hearing in Circuit Court.*

DECEMBER 16, 1880.

This day came the parties, by their counsel, and this cause came on to be heard upon the transcript of record from the district court, and was argued by Messrs. Van Dyke & Van Dyke for the libellant, and by Messrs. Lynde and Hibbard for the respondent, and the hearing not being concluded, the same was adjourned until to-morrow morning.

DECEMBER 17, 1880.

This day came the parties, by their counsel, and the hearing of this cause was resumed, and being submitted, the court held the same under advisement.

And now at this same term, to wit, August special term, 1882, and on the third day thereof, to wit, on the 4th day of September, A. D. 1882, the following proceedings were had, to wit:

Decree of Circuit Court.

THE PHŒNIX INSURANCE CO. OF BROOKLYN, Libellant & Appellant,
vs.
THE ERIE & WESTERN TRANSPORTATION COMPANY.

Appeal from district court.

This cause having been heretofore argued by the counsel for the

respective parties upon the pleadings and proofs, and the court being now sufficiently advised, it is ordered and adjudged that the libellant recover of the respondent on the contracts civil and maritime the sum of three thousand seven hundred and seventy-
29 six dollars and sixty-four cents.

And it is further ordered, adjudged, and decreed, that the libellant do have and recover of the said respondent, The Erie and Western Transportation Company, and Edwin T. Evans and Daniel M. Brigham, its stipulators, the said sum of three thousand seven hundred and seventy-six dollars and sixty-four cents, and in default of the payment of the same within ten days from date of the entry of this decree, that the said libellant have execution therefor.

And it is further adjudged and decreed that the order of the district court that each party pay one-half of the costs in that court be affirmed, and that libellant recover of the said respondent its said costs in this court.

And thereupon the said libellant prays an appeal to the Supreme Court of the United States, which is allowed upon its giving bond according to law, with security satisfactory to the court.

And same day findings of fact and conclusions of law filed as follows:

Findings of Fact and Conclusions of Law.

Circuit Court of the United States, Eastern District of Wisconsin.
In Admiralty.

THE PHŒNIX INSURANCE COMPANY OF BROOKLYN, Libellant and Appellant,
against
THE ERIE AND WESTERN TRANSPORTATION COMPANY.

30 In this cause, tried before the court without a jury, I make and file the following findings of fact and conclusions of law:

I. FINDINGS OF FACT.

1. That at all times herein mentioned the libellant, The Phœnix Insurance Company, was and now is a body corporate, organized under the laws of the State of New York, and empowered to transact a general lake and inland insurance business.

2. That at said times the respondent, The Erie & Western Transportation Company, was and now is a body corporate, organized under the laws of the State of Pennsylvania, authorized to carry on the business of lake transportation, and was engaged in business as a common carrier, and was proprietor of a line of propellers running between Erie and lake ports, designated as the Anchor Line, one of which boats was the propeller Merchant.

3. That on the 24th day of July, 1874, at the port of Chicago, Illinois, the firms of A. M. Wright & Co., Elmendorf & Co., and Gilbert Wolcott & Co. being owners of the following grain, to wit: The firm of A. M. Wright & Co. of 16,325.34 bushels of corn, of the value of $8,000; the firm of Elmendorf & Co. of 800 bushels of corn,

of the value of $600; and the firm of Gilbert Wolcott & Co. of
31 370.30 bushels of corn and 689.02 bushels of oats, all of the value of $800, caused the same to be shipped aboard the said propeller Merchant, then lying at said port of Chicago, and about to depart for said port of Erie, said shipments to be transhipped at Erie and forwarded to their destination as follows, to wit: The shipment of A. M. Wright & Co. was consigned to themselves, at Liverpool, England; the shipment of Elmendorf & Co. was consigned to themselves, 400 bushels thereof at Newark, New Jersey, and 400 bushels thereof at Bound Brook, New Jersey; the shipment of Gilbert Wolcott & Co. was consigned to themselves, at Tamaqua, Pennsylvania.

4. That on said 24th day of July, 1874, the libellant, at the request and expense of said shippers, respectively, insured them against loss or damage to said shipments from perils of the sea, &c., and issued to them respectively certificates of insurance, of which the following are copies:

Certificate of Insurance.

No. 627. THE PHŒNIX INSURANCE COMPANY, New York. $8,000.

CHICAGO, *July* 24, 1874.

This certifies that A. M. Wright & Co. insured, under and subject to the conditions of open policy No. 2263 of the Phœnix Insurance Company, in the sum of eight thousand dollars, on corn on
32 board the prop. Merchant, at and from Chicago to Erie. Loss payable to assured, order hereon, and return of this certificate.

CHAS. E. CHASE, *Agent.*

Assets, $2,000,000.

(Endorsed:) A. M. Wright & Co.

Certificate of Insurance.

No. 629. THE PHŒNIX INSURANCE COMPANY, New York. $260.00.

CHICAGO, *July* 24, 1874.

This certifies that Elmendorf & Co. insured, under and subject to conditions of open policy No. 2263 of the Phœnix Insurance Company, in the sum of two hundred and sixty dollars, on corn on board the propeller Merchant, at and from Chicago to Erie. Loss payable to assured, order hereon, and return of this certificate.

CHAS. E. CHASE, *Agent.*

Assets, $2,000,000.

(Endorsed:) Elmendorf & Co.

Certificate of Insurance.

No. 630. THE PHŒNIX INSURANCE COMPANY, New York. $260.00.

CHICAGO, *July* 24, 1874.

This certifies that Elmendorf & Co. insured, under and subject to the conditions of open policy No. 2263 of the Phœnix Insurance

Company, in the sum of two hundred and sixty dollars, on corn on board the propeller Merchant, at and from Chicago to Erie. Loss payable to assured, order hereon, and return of this certificate.

CHAS. E. CHASE, *Agent.*

Assets, $2,000,000.

(Endorsed:) Elmendorf & Co.

EXHIBIT "N."—W. J. C. FORSTER, *U. S. Com.*

Certificate of Insurance.

No. 628. THE PHŒNIX INSURANCE COMPANY, New York. $700.

CHICAGO, *July* 24, 1874.

This certifies that Gilbert Wolcott & Co. insured, under and subject to the conditions of open policy No 2263 of the Phœnix Insurance Company, in the sum of seven hundred dollars, on corn and oats on board the prop. Merchant, at and from Chicago to Erie. Loss payable to assured, order hereon, and return of this certificate.

CHAS. E. CHASE, *Agent.*

Assets, $2,000,000.

(Endorsed:) Gilbert Wolcott & Co.

That the policy of insurance in said certificates referred to was in the form of the words and figures following, to wit (the blanks being properly filled up):

38

No. 2263.

BY THE PHENIX INSURANCE COMPANY. [CARGO.]
13124

Charles E. Chase, on account of whom it may concern, in case of loss to be paid ——, in funds current in the city of New York, to him or to his order, do-make insurance and cause —— to be insured, lost or not lost, at and from ports and places to ports and places, on cargo, premiums to be settled monthly, upon all kinds of lawful goods and merchandise laden or to be laden on board the good vessel or vessels ——, ——, whereof is master for this present voyage —— ——, or whoever else shall go as master in the said vessel, or by whatever other name or names the said vessel, or the master thereof, is or shall be named or called.

Sum insured, $1,000,000.

Beginning the adventure upon the said goods and merchandise from and immediately following the loading thereof on board of the said vessel at —— aforesaid, and so shall continue and endure until the said goods and merchandise shall be safely landed at —— aforesaid. And it shall and may be lawful for the said vessel, in her voyage, to proceed and sail to, touch, and stay at any ports or places, if thereunto obliged by stress of weather or other unavoidable accident without prejudice to this insur-

ance. The said goods and merchandises hereby insured are valued (premium included) at ——.

Touching the adventures and perils which the said Phenix Insurance Company is contented to bear and take upon itself in this voyage, they are of the seas, men of war, fires, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, reprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, or people of what nation, condition, or quality soever, barratry of the master and mariners, and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, or any part thereof. And in case of any loss or misfortune, it shall be lawful and necessary to and for the assured, —— factors, servants, and assigns, to sue, labor, and travel for, in, and about the defence, safeguard, and recovery of the said goods and merchandises, or any part thereof, without prejudice to this insurance; nor shall the acts of the insured or insurers in recovering, saving, and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment, to the charges whereof the said insurance company will contribute according to the rate and quantity of the sum herein insured; having been paid the consideration for this insurance by the assured or —— assigns at and after the rate of —— per cent. on the subscribed amount of this policy on account. The company are to be entitled to premium at their usual rates on all shipments reported or not. It is warranted by the assured to report every shipment on the day of receiving advices thereof, or as soon thereafter as may be practicable, when the rate of premium shall be fixed by the president or the vice-president of the company.

This Company not to be liable for more than $— by any one vessel, at one time, unless otherwise agreed upon at the time of endorsement.

And in case of loss such loss to be paid in thirty days after proof of loss, and proof of interest in the said —— (the amount of the note given for the premium, if unpaid, being first deducted), but no partial loss or particular average shall in any case be paid, unless amounting to five per cent.: Provided always, and it is hereby further agreed, That if the said assured shall have made any other assurance upon the premises aforesaid prior in date to this policy, then the said Phenix Insurance Company shall be answerable only for so much as the amount of such prior assurance may be deficient towards fully covering the premises hereby assured; and the said Phenix Insurance Company shall return the premium upon so much of the sum by them assured as they shall

be by such prior assurance exonerated from. And in case of any insurance upon the said premises subsequent in date to this policy, the said Phenix Insurance Company shall nevertheless be answerable for the full extent of the sum by them subscribed hereto, without right to claim contribution from such subsequent assurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent assurance had been made. It is also agreed that the property be warranted by the assured free from any charge, damage, or loss which may arise in consequence of a seizure or detention for or on account of any illicit or prohibited trade, or any trade in articles contraband of war.

Warranted not to abandon in case of capture, seizure or detention, until after condemnation of the property insured; nor until ninety days after notice of said condemnation is given to this company. Also warranted not to abandon in case of blockade, and free from any claim for loss, damage or expense, arising from seizure, capture, detention, their consequences, or the consequences of any hostile act, whether lawful or unlawful, of any government, governments, or seceded States, or by unauthorized or lawless persons therein or otherwise, and whether occurring in a port of distress or otherwise, anything in the policy to this contrary notwithstanding; but in the event of blockade, to be at liberty to proceed to an open port, and there end the voyage.

Premium, $—.

Policy, $1.25.

Warranted by the assured that vessels loading grain from Alantic or Gulf ports in the United States, for foreign ports, or general cargo for East Indies or ports in the Pacific, are to be loaded under the inspection of the surveyor of this company or the surveyor of the Board of Underwriters, and his certificate as to their proper loading and seaworthiness obtained, or the insurance by them under the policy to be void. Also warranted not to load lime.

Proof of loss to be authenticated by the agent of the company, if there be one at the place such proofs are taken.

In witness whereof, the president or vice-president of the said Phenix Insurance Company hath hereunto subscribed his name, and the sum insured, and caused the same to be attested by their secretary, in New York, the twenty-seventh day of February, one thousand eight hundred and seventy-three.

Memorandum. It is also agreed, that bar, bundle, rod, hoop and sheet iron, wire of all kinds (covered or otherwise), tin plates, steel, madder, sumac, petro-

-ware and willow (manufactured or otherwise), salt, grain of all kinds, tobacco, Indian meal, fruits (whether preserved or otherwise), cheese, dry fish, hay, vegetables and roots, rags, hempen yarn, straw goods, bags, cotton bagging, and other articles used for bags or bagging, pleasure carriages, household furniture, skins and hides, musical instruments, looking-glasses, and all other articles that are perishable in their own nature, are warranted by the assured free from average, unless general; hemp, tobacco stems, matting, and cassia, except in boxes, free from average under twenty per cent. unless general; and sugar, flax, flaxseed, and bread, are warranted by the assured free from average under seven per cent. unless general; and coffee in bags or bulk, pepper in bags or bulk, and rice, free from average under ten per cent. unless general.

Warranted by the insured free from damage or injury, from dampness, change of flavor, or being spotted, discolored, musty or mouldy, except caused by actual contact of sea water with the articles damaged, occasioned by sea perils: In case of partial loss by sea damage to dry goods, cutlery or other hardware, the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so demaged, and not otherwise; and the same practice shall obtain as to all other merchandise as far as practicable. Not liable for leakage on molasses or other liquids, unless occasioned by stranding or collision with another vessel.

If the voyage aforesaid shall have begun, and shall have terminated before the date of this policy, then there shall be no return of premium on account of such termination of the voyage. It is understood and agreed that this policy shall not be deemed as continued in force for more than one year from the date hereof, unless otherwise agreed upon, and endorsed herein.

In all cases of return of premium, in whole or in part, one-half per cent, upon the sum insured, is to be retained by the assurers.

No shipment to be considered as insured until approved and endorsed on this policy by C. E. Chase, agent. Endorsements valued at the same, provided they do not vary from the cost more than — per cent. and the sound value at the port or place of destination is not to be deemed to exceed ten per cent. on the purchasing prices at the shipping port.

$1,000,000. One million dollars.

STEPHEN CROWELL, *President.*

W. R. CROWELL, *Marine Sec'y.*

34 And said several shipments were duly approved and endorsed on said policy.

5. That during the evening of July 24th, 1874, said propeller completed the lading on board of said shipments, and about midnight departed on her voyage. That about ten o'clock the next morning said propeller in a dense fog was stranded on the western shore of Lake Michigan, about ten miles south of Milwaukee, through the negligence of those managing the propeller.

That upon striking, said propeller filled with water, and said shipments became damaged and wet. That assistance was obtained at said port of Milwaukee, and a portion of the cargo consisting of flour on deck was lightened off and saved; that twelve thousand bushels of said grain were pumped and thrown overboard in releasing said propeller from the beach, the same being wet, damaged and unfit for reshipment, and 5,188 bushels of corn which, in a perishable condition, unfit for reshipment was brought into said port of Milwaukee in the hold of said propeller, and was there sold for the price of 20 cents per bushel, and the proceeds thereof, except of $20.00 paid for lighterage, respondent retains.

6. That said shippers abandoned said shipments to libellant as a total loss, and executed to libellant instruments of assignment
35 in the words and figures following, to wit:

CHICAGO, *August* 19, 1874.

For and in consideration of the sum of eight thousand and no 100 dollars, the receipt whereof is hereby acknowledged, we do by these presents assign, transfer, cede, and abandon to the Phœnix Insurance Company all our right, title and interest in and to the property hereinafter specified, and to all that can or may in any way be made, saved, or realized from the damage or loss, reported to have occurred, by reason of which a claim of payment has been made by us, with full power to take and use all lawful ways and means (at the risk and expense of the Phœnix Ins. Co.) to make, save, and realize the said property, to wit, 16,325.34 bushels of corn, as per bill of lading and invoice, shipped on board the propeller Merchant, bound from Chicago for Erie, and covered by insurance with the Phœnix Ins. Co., by open policy No. 2263, certificate No. 627, under date of July 24th, 1874.

To the extent of the interest of the said Phœnix Ins. Co. in said property.

A. M. WRIGHT & CO.

CHICAGO, *September* 10, 1874.

For and in consideration of the sum of five hundred and twenty and no hundredths dollars, the receipt whereof is hereby acknowledged, we do by these presents, assign, transfer, cede, and abandon to the Phœnix Ins. Co. all our right, title and interest in and to the property hereinafter specified, and to all that can or may in any way be made, saved, or realized from the damage or loss reported to have occurred, by reason of which a claim for payment has been made by

us, with full power to take and use all lawful ways and means (at the risk and expense of the Phœnix Ins. Co.) to make, save, and realize the said property, to wit, 800 bushels of corn, as per bill of lading and invoice, shipped on board the propeller "Merchant," bound from Chicago for Erie, and covered by insurance with the Phœnix Ins. Co., by open policy No. 2263, certificates Nos. 629 and 630, under date of July 24, 1874.

ELMENDORF & CO.

CHICAGO, *September 10th*, 1874.

For and in consideration of the sum of seven hundred and no 100ths dollars, the receipt whereof is hereby acknowledged, we do by these presents assign, transfer, cede, and abandon to the Phœnix Ins. Co. all our right, title, and interest in and to the property hereinafter specified, and to all that can or may in any way be made, saved, or realized from the damage or loss reported to have occurred, by reason of which a claim of payment has been made by us, with full power to take and use all lawful ways and means (at the risk and expense of the Phœnix Ins. Co.) to make, save, and realize the said property, to wit, grain as per bill of lading and invoice, shipped on board the propeller Merchant, bound from Chicago for Erie, and covered by insurance with the Phœnix Ins. Co., by open policy No. 2263, certificate No. 627, under date of July 24th, 1874.

GILBERT WOLCOTT & CO.
For LOUIS BREHLER, *Consignee.*

36 That in consequence thereof, libellant paid said shippers in full the amount of said insurances as and for a constructive total loss.

7. The facts respecting the contract of shipment were these:

On said 24th day of July, 1874, said shippers severally made verbal agreements with respondent for the transportation of said grain, whereby respondent, in consideration of certain stipulated freight, agreed to transport said several parcels of grain from Chicago to Erie *via* the Lakes, and thence to forward them to their destinations as aforesaid. It was tacitly understood that bills of lading would subsequently issue to said shippers for said shipments, but nothing whatever was said respecting the terms and conditions thereof, and especially nothing was said touching the terms and conditions particularly set forth in the twenty-seventh, thirtieth, and thirty-third articles of respondent's answer.

That after said property had been received on board, and said propeller had departed on her voyage, respondent delivered to said shippers, respectively, contracts, copies whereof, except certain signatures thereto, are annexed to respondent's answer, and marked Exhibits A, B, and C, respectively.

37 That said contracts were received by said shippers without protest or objection, and they were signed in behalf of said firms of Elmendorf & Co., and Gilbert Wolcott & Co., but

the one delivered to A. M. Wright & Co. was not signed by or on behalf of said firm of A. M. Wright & Co.

Said contracts so delivered and signed were received without specially reading the terms and conditions contained in those particular contracts, and the attention of said shippers was not directed thereto, nor was anything said respecting them, and no reduction of freight was made from the rate stipulated in said verbal agreement in consequence of said terms and conditions, or other consideration paid therefor, but the shippers knew the terms of said contracts or bills of lading, and had often before shipped goods by said line under similar contracts, or had every opportunity of knowing the contents of said bills of lading by repeatedly shipping goods under similar contracts.

8. That on or about the 2d day of September, 1874, a general average adjustment respecting said loss was *was* made, and the sum of $1,530.04 awarded to libellant on account of said shipments.

That said shipments were charged in said adjustment with full lake freight.

That thereafter, and on or about the first day of February,
38 1875, said adjustment was readjusted, and said lake freight was not charged against said shipments, and the sum of $2,466.12 was awarded to libellant on account of said shipments.

II. I find the following conclusions of law—

1. That said receipts or bills of lading are the contracts by which the rights of the parties are to be governed.

2. That thereunder respondent became liable to said shippers for the value of said shipments by reason of the negligent loss of the same, and that said shippers had rights of action therefor.

3. That by the abandonments aforesaid libellant did not succeed to said rights of action of said shippers by reason of the stipulation contained in said bills of lading, in the words following, to wit:

It is further stipulated and agreed that in case of any loss, detriment, or damage done to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment, or damage, and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods.

39 4. That libellant is entitled to recover the sum of $2,466.12, the sum awarded to it in the general average adjustment readjusted as aforesaid, together with interest thereon from the first day of February, A. D. 1875, the date of said readjustment.

THOMAS DRUMMOND,
Cir't Judge.

OCTOBER 9, 1882.

This day came the libellant, by its proctors, and filed the bond of John Fitzgerald and John B. Merrill, in the sum of five hundred

dollars, conditioned that said libellant "shall prosecute its appeal with effect and pay all costs and expenses as shall be awarded against it as such appellant therein," which bond is approved by the circuit judge, and is as follows:

Appeal Bond.

Know all men by these presents:

That we, John Fitzgerald and John B. Merrill, both of the city and county of Milwaukee and State of Wisconsin, are held and firmly bound unto The Erie and Western Transportation Company, a body corporate of the State of Pennsylvania, in the sum of five hundred dollars, to be paid to the said The Erie and Western Transportation Company, its successors and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, ex-
40 ecutors, administrators, jointly and severally, firmly by these presents.

Sealed and dated this 7th day of October, 1882.

Whereas the Phœnix Insurance Company of Brooklyn, a body corporate of the State of New York, has appealed from a decree of the United States circuit court for the eastern district of Wisconsin, bearing date the 4th day of September, A. D. 1882, in a cause in which said Phœnix Insurance Company of Brooklyn was libellant and the said The Erie and Western Transportation Company was respondent, to the Supreme Court of the United States:

Now, therefore, the condition of this obligation is such, that if said Phœnix Insurance Company of Brooklyn, the appellant above named, shall prosecute its appeal with effect and pay all costs and expenses as shall be awarded against it as such appellant therein, then this obligation to be void; otherwise, to remain in full force and effect.

JOHN FITZGERALD. [SEAL.]
JOHN B. MERRILL. [SEAL.]

In presence of—

The erasure of the word John in the second line made before signing.

GEO. D. VAN DYKE.
GEO. H. LAWRENCE.

EASTERN DISTRICT OF WISCONSIN, *ss:*

John Fitzgerald and John B. Merrill, being severally sworn, depose and say, and each for himself says: That he is worth the
41 sum of ten thousand dollars over and above all his debts and liabilities, in property within said district not exempt by law from execution or seizure, or sale thereon; and that he is a resident freeholder within said district.

JOHN FITZGERALD.
JOHN B. MERRILL.

Subscribed & sworn to before me, this 7th day of October, 1882.
[SEAL.] GEO. H. LAWRENCE,
Notary Public, Milwaukee County, Wis.

Endorsed as follows: I approve the within bond as to form and sureties. Appeal prayed & allowed. Dated October 9, 1882. Thomas Drummond, cir't judge.

Whereupon a citation issued.

42 UNITED STATES OF AMERICA, } *ss:*
Eastern District of Wisconsin, }

I, Edward Kurtz, clerk of the circuit court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate with their originals now on file and remaining of record in my office, and that they are true copies of such originals, and correct transcripts therefrom, being a transcript of the record in the case of The Phœnix Insurance Co. of Brooklyn *vs.* The Erie & Western Transportation Company.

In testimony whereof, I have hereunto set my hand, and duly affixed the seal of the said court at the city of Milwaukee, in said district, this 12th day of October, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the 107th.

[SEAL.] EDWARD KURTZ, *Clerk.*

43 THE UNITED STATES OF AMERICA, *ss:*

To the Erie & Western Transportation Company, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States on the second Monday of October, 1883, pursuant to an appeal from a decree of the circuit court of the United States for the eastern district of Wisconsin, wherein The Phœnix Insurance Company of Brooklyn is appellant and you are appellee, to show cause, if any there be, why the said decree should not be corrected and speedy justice be done to the parties in that behalf.

Witness the Honorable Thomas Drummund, judge of the circuit court of the United States for the seventh circuit and eastern district of Wisconsin, this 9th day of October, 1882.

THOMAS DRUMMOND,
Circuit Judge.

44 [Endorsed:] United States circuit court, eastern district of Wisconsin. Phœnix Ins. Co. *v.* Erie & West. Trans. Co. Citation. Service of the within accepted, this 12th day of October, 1882. Finches, Lynde & Miller, proctors for Erie & West. T. Co., respondent & appellee.

Endorsed on cover: E. Wisconsin C. C. U. S. No. 393. The Phœnix Insurance Company of Brooklyn, appellant, *vs.* The Erie & Western Transportation Company. Filed 16th October, 1882.

117-312

FILED
DEC 21 1885
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

THE PHŒNIX INSURANCE COMPANY OF BROOKLYN,

Libellant and Appellant,

vs.

THE ERIE & WESTERN TRANSPORTATION COMPANY,

Respondent and Appellee.

BRIEF FOR APPELLANT.

GEORGE A. BLACK,

Counsel for Libellant and Appellant,

66 WALL STREET,

New York.

C. G. BURGOYNE'S "Quick" Print, 146-150 Centre St., N. Y.

Supreme Court of the United States.

THE PHŒNIX INSURANCE COMPANY OF BROOKLYN,
Libellant and Appellant,

vs.

THE ERIE & WESTERN TRANSPORTATION COMPANY,
Respondent and Appellee.

BRIEF FOR APPELLANT.

Introductory Statement.

For many years past a conflict has been going on between common carriers on the one side and the public who employ them on the other, the carrier seeking by various devices of phraseology in his bills of lading to secure exemption, not only from the rigorous rules of the common law, but also from all responsibility to the owners of the property entrusted to him. As the practice of insurance has increased and become more general the insurance companies have necessarily been drawn into this conflict, and one of the latest of the carriers' devices in seeking to evade responsibility is by attempting to obtain the benefit of any insurance effected by the owner upon his property.

Up to the present moment some of these attempts have been sustained in the lower courts, and the carrier, without paying for it, has succeeded in obtaining—indirectly, it is true—the benefit of such insurance by avoiding a liability to an insured owner on the plea that he has been already satisfied with the insurance money. That this course of dealing necessarily must result in an injury to

the public in general is apparent. If the insurance companies are compelled to give up all claims against carriers for the negligent destruction of property it is manifest that a very large risk is added to those they already cover, and that a corresponding premium must of necessity be charged by them; so that, while the public find a benefit in taking the additional protection of insurance against the acts or negligence of carriers, they will be compelled to bear the additional burden of these increased rates.

This matter is now for the first time brought before this Court for review in respect to one of the attempted forms of evasion by the carrier, and, from its nature, the inquiry presented is of a very far-reaching character and calls for all the more consideration to be given to it.

Statement.

The appellant filed its libel in Admiralty before Hon. Charles E. Dyer, Judge of the District Court of the United States for the Eastern District of Wisconsin, setting forth that the libellant was a body corporate created by the laws of the State of New York, and authorized to transact a general lake and inland insurance business. That the respondent corporation was a common carrier, and owner of the propeller *Merchant*.

The libel sets out, in three separate counts, that at Chicago, in July, 1874, the firms of A. M. Wright & Co., Elmendorf & Co., and Gilbert, Wolcott & Co. shipped quantities of corn and other grain of the value of $12,200 on the said propeller, to be carried to Erie, Pa., and that the three shipments were separately insured by the libellant against marine risks. That the vessel set sail with the said cargo on board, and by the mismanagement and negligence of the servants of the respondent corporation the said propeller was stranded on the western shore of Lake Michigan, and the said corn greatly damaged and lost. The libel then sets forth the *abandonment* on the 12th of August, by A. M. Wright & Co., and by Elmendorf & Co., and on the 14th of August, by Gilbert, Wolcott & Co., and the payment by the insurance company of $8,000 to Wright & Co., of $548 to Elmendorf & Co., and of $700 to Gilbert, Wolcott & Co., all on the 19th of August, 1874. That by reason of such abandonment the libellant became subrogated to the respective rights of said insured, the owners of said corn.

This libel was filed on the 20th of August, 1877. Process of foreign attachment was issued and the steamer *Alaska* belonging to the respondents attached (Record, p. 9). The respondent came into Court, and, protesting against its jurisdiction, made a claim to the said vessel, and gave bonds in the agreed value of $16,000, and filed its answer, admitting the said shipments alleged, averring that they were under bills of lading, the form of which is set forth, denying the negligence, protesting against said seizure of the *Alaska* and setting forth as a distinct matter of defense the clause of the bills of lading that, "in case of any loss or damage * * * to "said corn * * * whereby any legal liability or responsibility "should or might be incurred, that company only should be held "answerable therefor in whose actual custody the same might be "at the time of the happening of such loss, detriment or damage, "and the carrier so liable should have the full benefit of any insur- "ance that might have been effected upon or on account of said "last-mentioned corn." (See Record, pp. 13–25 inclusive.)

The cause was tried in the District Court and a decree entered on January 8th, 1880, by which the libellants recovered for the salvage $1,426.18. The opinion of the Court, DYER, J., will be found in "Lawson on Carriers," p. 383, and in 10 Bissel, p. 18.

An appeal was taken by the libellants to the Circuit Court, and on the 4th of September, 1882, that Court filed its findings, which are printed at page 33 of the Record, and adjudged that the libellants recover for the salvage $3,776.64. A decree was entered on the 4th of September, 1882. (Record, p. 32.)

The libellant then appealed to this Court.

The Circuit Court found by its fifth finding that during the evening of July 25th, 1874, said propeller completed the lading on board of said shipments, and about midnight departed on her voyage. That about ten o'clock the next morning the said propeller in a dense fog was stranded on the western shore of Lake Michigan, about ten miles south of Milwaukee, THROUGH THE NEGLIGENCE OF THOSE MANAGING THE PROPELLER.

In the sixth finding it sets forth that the said shippers *abandoned* said shipments to libellant as a total loss, and that in consequence thereof libellant paid said shippers in full the amount of said insurance *as and for a constructive total loss*, and further states the execution of instruments of assignment to the libellant.

The Court had already found that the value of the corn and grain shipped on the *Merchant* by the several insured was $9,400

see 3d finding, p. 33: that there was saved 5,188 bushels of corn, which was sold in a perishable condition (5th finding, p. 39); that the amount of such savings belonging to the libellant was $2,466.12 (8th finding, p. 41). The facts of the shipment are set forth in the 7th finding (p. 40) as follows:

"On said 24th day of July, 1874, said shippers severally made "*verbal* agreements with the respondent for the transportation of "said grain. * * * from Chicago to Erie. It was "tacitly understood that bills of lading would subsequently issue to "said shippers for said shipments, but nothing whatever was said "respecting the terms and conditions thereof, and especially noth- "ing was said touching the terms * * * of the clause "of the bills of lading (which is recited in the following assignment "of error.) That after such property had been received on board "and the propeller had departed on her voyage, respondent de- "livered to said shippers contracts which are the bills of lading set "forth as Exhibits A, B and C in the record, pp. 26 to 29. That said "contracts were received by said shippers without protest or objec- "tion, and were signed on behalf of said firms of Elmendorf & Co., "and Gilbert, Wolcott & Co., but the one delivered to A. M. Wright "& Co. was not signed by or on behalf of said firm of A. M. Wright "& Co. Said contracts so delivered and signed were received with- "out *specially* reading the terms and conditions contained in those "particular contracts, and the attention of said shippers was not "directed thereto, nor was anything said respecting them, and *no* "*reduction of freight was made from the rate stipulated in said ver-* "*bal agreement in consequence of said terms and conditions, or other* "*consideration paid therefor,* but the shippers knew the terms "of said contracts or bills of lading, and had often before shipped "goods by said line under similar contracts, or had every oppor- "tunity of knowing the contents of said bills of lading by repeatedly "shipping goods under similar contracts."

On these findings the Court found as conclusions of law (p. 41):

(1) "That said receipts or bills of lading are *the contracts* by "which the rights of the parties are to be governed.

(2) "That thereunder respondent became liable to said SHIPPERS for the value of said shipment by reason of the *negligent* loss of the same, and *that said shippers had rights of action therefor.*"

(3) That by the abandonments aforesaid libellant *did not* suc-

ceed to said rights of action of said shippers *by reason of the stipulation contained in said bills of lading.*

Assignment of Error.

Only one question is presented by the appellants under the findings made by the Circuit Court, and that is as to the third conclusion of law, which is in these words:

"That by the abandonments aforesaid libellant did not succeed "to said rights of action of said shippers by reason of the stipula- "tion contained in said bills of lading in the words following, "to wit:

"'It is further stipulated and agreed that in case of any loss, detriment or damage done to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall, or may be, incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment or damage, and *the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods.*'"

Three main questions are presented, and under them subsidiary ones, as follows:

I. The *contract* of the common carrier.

(*a*) Do the rights of the owner depend upon the *contract* or upon the *obligation* of the carrier arising out of the common law?

(*b*) Is the clause of the bill of lading in legal effect a contract to relieve the carrier from his own negligence?

II. The contract of *marine* insurance.

(*a*) What interest is insured?

(*b*) What are the terms and conditions of abandonment, and what passes by it?

1. Does the abandonment vest a legal or a mere equitable title in the insurer? In other words, is the situation

of the insurer after abandonment that of a surety having an equitable right to *subrogation*, or that of a purchaser having a legal title?

(*c*) Does the portion of salvage which passes by abandonment and vests in the insurer so far as it is *property saved* stand on any different basis than the portion of the salvage which is a *claim* for injury to the property, because *at law* (not in admiralty or in equity) the insurer has to sue in the name of the assured."

III. The status of the libellant as assignee.

POINTS.

First Point. The carrier's liability arises, not out of his contract, but out of the legal duty imposed upon him to safely carry and deliver. As is said by DALLAS, C. J., in Bretherton vs. Wood, 3 Brod. & Bing., 54:

> "A breach of this duty is a breach of the law, and for this breach an action lies founded on the common law, which action needs not the aid of a contract to support it."

In the Atlantic Mutual Ins. Co. vs. McLoon, 48 Barb., 27, the Court says:

> "No debt arises from the negligent loss of goods by a common carrier. He is not an insurer of the safe delivery of goods notwithstanding he has contracted safely to carry them from one port to another. He is held liable for negligence *not* from any contract against negligence, but because such a loss arises from a breach of duty imposed by the trust or agency he has assumed. While the carrier has the goods safely in his possession he holds them under a contract, and on demand by the owner and satisfaction of the carrier's lien, an action would lie upon his contract, under an ordinary bill of lading, to safely carry and deliver the goods in case of a refusal by the carrier to make a right delivery.
>
> "The nature of the action is not the same when it arises from a negligent loss. The negligence is the cause of action, and it

is in the nature of a tort, not much less culpable than it is for one carelessly to injure or destroy the property of another."

The following are illustrations of the liability of the carrier for a breach of duty:

To a mail agent—Notton vs. R. R. Co., 15 N. Y., 444.

To a servant (master paying for transportation)—Marshall vs. Rway. Co., 11 C. B., 655.

To a passenger on an excursion train where the ticket was bought from the association which hired the train—Skinner vs. Rway. Co., 5 Exch., 787.

Under a contract which was void, being made on Sunday—Carroll vs. R. R., 58 N. Y., 126; The Washington and Gregory, 9 Wall., 513.

In the Phila. & Reading R. R. Co. vs. Derby, 14 How., 483, GRIER, J., says:

"This duty does not result alone from the consideration paid for the service. It is imposed by law even when the service is gratuitous."

Catlin vs. The Adirondack Co., 20 Hun, 22.

The same distinction is taken in actions for negligence in towing.

In the *Quickstep*, 9 Wall., 665, the Court says:

"The libel was not filed to recover for a breach of contract, as is contended, but to obtain compensation for the commission of a tort. It is true it asserts a contract of towage, but this was done by way of inducement to the real grievance complained of, which is the wrong suffered by the libellant by the carelessness and mismanagement of the captain of the *Quickstep*."

The *Brooklyn*, 2 Ben., 547.
The *Deer*, 4 Ben., 355.
The *Liberty*, 7 F. R., 226.

Second Point. Such being the duty of the common carrier from which flows the corresponding remedy for a violation of it, the carrier has attempted by *contract* to be relieved from such duty: in this effort the clauses of the bills of lading relieving the carrier

from various risks and exempting him from liability for negligence have been devised. These clauses have operated as a release, or covenant not to sue would operate, for the owner, not being dependent on the contract for his right of action, the carrier would be compelled to set them up as a bar, and his efforts to do so have led to the adjudications of this Court declaring it to be against public policy to permit him to avoid the effect of his own negligence, and consequently holding all stipulations to that effect void *ab initio;* and in reaching the conclusion that they were void, the grounds on which the Court has placed its decision are equally applicable to the efforts of the carrier to evade responsibility by the asserted right to the insurance money here presented This is shown by the language of the Court in Bank of Kentucky vs. Adams Express Co., 93 U. S., 183:

> "The foundation of the rule (*i. e.*, that common carriers cannot stipulate for exemption from liability for their own negligence and that of their servants and agents) is that it tends to the greater security of consignors, who always deal with such carriers at a disadvantage. It tends to induce greater care and watchfulness in those to whom an owner intrusts his goods and by whom alone the needful care can be exercised. ANY CONTRACT *that withdraws a motive for such care, or that makes a failure to bestow upon the duty assumed extreme vigilance and caution more probable, takes away the security of the consignors, and makes common carriage more unreliable.*"

In Matthews vs. the How. Ins. Co. (11 N. Y., 16), the Court uses this language:

> "Suppose a class of sea risks to be excepted from the policy —should the vessel be lost by encountering one of these risks no one would consider the insurer liable, though it should be shown that the carelessness of the master was the sole efficient and procuring cause, and this consideration demonstrates that the underwriters do not contract for the care and skill of the crew as a distinct hazard from which accidents may be expected. *Such a contract, if made in terms, would be opposed to sound policy* as tending to encourage a relaxation of that degree of attention and vigilance so necessary at sea, and which might be expected to follow from a knowledge on the part of the

master and mariners, that their immediate employers would be protected against the consequences of their inattention."

Such being the declared foundation of the rule which prohibits the carrier from exempting himself from his negligence, is there not in the allowance of the claim for the insurance money, which has been made in this case, a clear contract which withdraws a motive for such care?

It is not alone in the case of carriers that the same principle has been carried to its full extent. Seamen may not insure their wages, and the reason is given by TANEY, C. J., in Ardrey vs. Karthaus (Taney Decs., 381):

> "The general rule is that freight is the mother of wages, and when freight is earned or damage recovered in lieu of it, the seamen are entitled to wages. It has frequently happened, that after the capture of a neutral vessel, and condemnation and sale, the sentence has been reversed in the appellate Court and restoration ordered, and in such cases where the owner recovered freight, the seamen are undoubtedly entitled to wages. The only exception to the rule is the case of recovery against the underwriters. But that exception stands entirely upon principles of policy, for, as a seaman is not permitted to insure his own wages (and such a contract of insurance would be void in law), he cannot, for the same reason, protect his wages under the insurance of the owner, for that would allow him to accomplish indirectly what he is not permitted to accomplish directly."

To the same effect is Icard vs. Goold (11 John., 279), where PLATT, J., says at p. 280:

> "The law is well settled that insurance on freight is for the indemnity of the owners only, and does not enure to the benefit of seamen's wages, which cannot be insured either directly or indirectly."

This principle was applied in the *Hadji* (20 Fed. Rep., 876), by Judge WALLACE, who says:

> "The same reasons that forbid the recognition of an express contract between the carrier and shipper, exempting the former from liability for his own negligence, forbid a contract be-

tween them which is designed to work out the same result. That which cannot be done directly will not be permitted to be done indirectly."

NOTE.—The clause of the bill of lading in that case was "no damage that *can* be insured against will be paid for."

He further says:

"It suffices that the carrier cannot divest himself of his own responsibility for negligence by *requiring* the shipper to protect himself against it, and that an agreement having this operation is void."

The only real difference between the clause so rejected by Judge Wallace and the present one would be expressed by the words, "No damage that the owners *may have* insured against will be paid for."

In England it became necessary to pass a statute to enable a common carrier himself to effect insurance in this class of cases. 25th and 26th Vic., Chap. 63, Sec. 54 (1862), provides for the limitation of liability of owners for negligence of master.

Sec. 55. "Insurance effected against any or all of the events enumerated in the section last preceding and occurring without such actual fault or privity as therein mentioned, *shall not be invalid* by reason of the nature of the risk."

Maclachlan Mch. Shpg., Appendix, p. 37.

In certain text books it is laid down that a carrier having a liability may insure, but no case can be referred to where his liability for his own negligence has been declared insurable, and one case, to wit: Gen. Mu. Ins. Co. vs. Sherwood (14 How., 351), distinctly holds it uninsurable.

Emerigon, p. 290, says:

"As Poitier remarks, 'It is evident that I cannot validly agree with any one that he shall charge himself with the faults that I shall commit.'"

In McCulloch's Dictionary of Navigation, Title Barratry, is this clause, which is cited in Atkinson vs. Gt. Western Ins. Co., 65 N. Y., 537:

"But though it were expedient to prevent the *owners* from

making an insurance of this sort, nothing can be more reasonable than that third parties whose freight is shipped, or who put goods on board, should be allowed to insure against such a copious source of loss."

1 Phillips on Insurance, Sec. 211, says:

"Though there is no express prohibition in respect to a subject, still if insurance upon it is contrary to the spirit and general principles, or what we call the policy, of the law, the owner cannot make a valid insurance upon it. Thus, an assured cannot be protected by insurance against loss and damage by his own crimes, frauds and misconduct."

And at Sec. 212:

"Wages of mariners are universally considered not to be insurable by the mariners themselves, not on account of the insufficiency of the interest and risk, but lest their motives to exertion for the safety of the ship and cargo should be diminished."

Third Point. The Contract of Marine Insurance.

In approaching the consideration of this branch of the case it is appropriate that attention should be called to the undefined character of the law applied to it, and to the fact that its principles are still being sought for.

As is said in Ins. Co., vs. Dunham (11 Wall., p. 31): "Perhaps the best criterion of the *maritime* character of a contract is the system of law from which it arises, and by which it is governed, and it is well known that *the contract of insurance sprang from the law maritime, and derives all its material rules and incidents therefrom.* It was unknown to the common law, and the common law remedies when applied to it were so inadequate and clumsy that disputes arising out of the contract were generally left to arbitration until the year A. D. 1601, when the statute of 43 Elizabeth was passed, creating a special court or commission for hearing and determining causes arising on policies of insurance."

Judge STORY, writing in 1835 (Story's Equity, § 20), says: "The whole law of insurance is scarcely a century old, and more than half its most important principles and distinctions have been *created* within the last fifty years."

But from very old times the right of the insured to abandon for

a constructive total loss and the right of the insurers upon payment to an abandonment of the interest of the insured in all that is saved of the property, and all rights and remedies for injuries to the property has been asserted in the text-books and recognized by the Courts. In England a special statute has declared void all contracts of insurance without benefit of salvage (Alkins vs. Jupe, L. R. 2, Com. Pleas Div., 375). And where there is no salvage, as in a case of bottomry bond, the insurance is invalid which does not specifically describe the character of the interest insured, for the reason that the underwriter would be imposed upon in taking such an insurance, which would be at an increased premium, as he would get no benefit from the salvage.

Robertson vs. United Ins. Co., 2 Johnson's Cases, 252, KENT, J.:

"Glover vs. Black, (3 Burr., 1394), is decisive upon this point. "It was held that respondentia and bottomry must be mentioned "in the policy, and that this was the law and practice of nations. "The risk on a bottomry policy is peculiar. *There is neither average* "*nor salvage.*"

2 Duer on Ins., p. 462.
Lowndes' Law of Marine Ins., p. 21, Sec. 23.

Emerigon, Meredith's Translation, Ch. XVII., Sec. VI., p. 684:

"By abandonment the assured subrogates the insurers in his place and stead. He quits and abandons to the insurers his rights, titles, claims and *rights of action* of the property he has in the merchandise shipped. *The abandonment is equivalent to a transfer.*

"After notice of abandonment, says the Ordonnance, *the effects insured shall belong to the insurer.*

"Page 685. When there is a total loss, abandonment is regarded at Genoa as a superfluous ceremony, *unless there be some right of action to be exercised against a third party.* But it does not belong to the assured to decide that there will not remain any resource to the insurers. The abandonment, then, is to be made to them notwithstanding the total loss of the vessel."

(And this seems to be the latest opinion of the English Courts and text writers.

See Lowndes on M. Ins. (2 Ed., 1885), p. 156, and cases cited.)

Page 686. "The abandonment has retroactive effect as against the insurers who, to the extent of the interest insured, are *presumed to have been from the beginning owners of the thing insured. Quod repudiatur retro nostrum non fuisse palam est.*"

2 Phillips on Ins., § 1712: fr 407 – 4 Ed

"A policy in favor of any party upon any subject whatsover is an insurance upon his *own interest* in it or that of another whom he represents. It is this alone upon which he can sustain a loss, and it is the loss of this alone for which he can recover. * * * When the underwriters have paid him for the loss of the insured * * * subject, they have paid him for so much for the interest which they insured, and seem to be entitled, BY THE FUNDAMENTAL PRINCIPLE OF THE CONTRACT, TO THE ASSIGNMENT TO THEM OF THE THING FOR THE LOSS OF WHICH THEY HAVE INDEMNIFIED HIM."

Id., § 1683: "So the payment of a total loss operates as an abandonment."

2 Arnold on Ins., 995* (999 2d Am. Ed.):

"In such cases (accepted abandonment) it operates both here and elsewhere as a complete and effectual transfer of property from the assured to the underwriters, who, in the language of the Continental jurists, are, by virtue of it, *subrogated* into the place of the assured. (Par le delaissement l'assuré subroge les assureurs en son lieu et place.) Emerigon, Ch. 17, Sec. 6 (p. 684, Meredith, Ed. 1850). It has *even a retrospective* effect, and operates as an *assignment* of the property, *not* only from the time it was given, but from the moment of the loss which justified it; so that the underwriters are *presumed* to have been the *owners* of the thing insured from the period of the loss." (Cammell vs. Sewell, 3 H. & N., 617, affd. 5H. & N., 728*.)

Id., 4 Eng. Ed., p. 863. "The effect of a valid abandonment is to transfer the whole interest in what remains of the thing insured, so far as it is covered by the policy, *together* with all the rights *and liabilities arising out of its ownership*, from the assured to the underwriters, in proportion to the amount of their several subscriptions. This transfer, according to what seems to be the true principle, *is retrospective*, operating from

the moment of the casualty which gave the right to abandon. There are losses as to which the doctrine is more properly expressed, by saying that the insurer is, by abandonment, *subrogated*, upon payment, into the rights of the assured."

Id., 867. But even when *no notice of abandonment has been given, and a total loss has taken place, the rule applies.* The underwriter, who has paid a total loss, is entitled to the benefit of any salvage that may ultimately come to hand, or the proceeds of any sale of the property that may have been made by the assured or the master, as his agent. Thus, in the case of a missing ship, where *there had been no abandonment*, GIBBS, C. J., said that " the underwriters, on payment of a total loss, would, of course, be entitled to the ship, if she afterwards turned up, as salvage. (United Ins. Co. vs. Robinson, 1 John., 591.)

3 Kent, p. 430 (318*) :

" It is a *constructive total loss* if the thing insured, though existing in fact, is lost for any beneficial purpose to the owner. In such cases the insured *may abandon all his interest in the subject insured and all his hopes of recovery to the insurer*, and call upon him to pay as for a total loss. * * * In such cases the insurer stands in the place of the insured, and takes the subject to himself with all the chances of recovery and indemnity. *A valid abandonment has a retrospective effect*, and *does of itself and without any deed of cession, and prior to the actual payment of the loss, transfer the right of property to the insurer* to the extent of the insurance, and if *after* an abandonment duly made and accepted the ship should be recovered and proceed and make a prosperous voyage, the insurer, as owner, would reap the profit." Comegys vs. Vasse, 1 Peters, 214 ;

Id., p. 432 (320*) : " These considerations have introduced the right of abandonment into the insurance law of every country, and yet the text writers have generally *condemned* the *privilege* as *inconsistent with just notions concerning the nature of the contract of indemnity.*"

See on same point 2 Phillips on Ins., Sec. 1492.

2 Phillips on Insurance, § 1608 : 4 - Ed ch 329

" In the United States the assured on goods damaged to " more than half of their value has a right to abandon and re-

"cover the whole amount insured, as well as in case of a policy
"on the ship." citing Marcandier v 8 Cranch 39, 1 Wheat 21,

Parsons' Mer. Law, 444:

"If the cargo is damaged through the fault of the master or "crew, the shipper has a remedy against the owner of the "ship. But this does not necessarily discharge the insurers. "If, however, he enforces his claim against them he is bound "to transfer to them *by a kind of subrogation* his claim against "the ship-owner."

Lowndes on Marine Insurance, Second Edition, 1885.

"§ 143. When a total loss, whether actual or constructive, "has taken place, the insurer is to pay the sum insured or in- "surable, as defined in the first chapter, and is, on the other "hand, entitled to whatever may be recovered, the assured "abandoning to him all his property in the thing insured, or "what may remain of it, or what may accrue as an incident of "ownership. *Such abandonment is implied as accompanying "every settlement of a claim for total loss. It is unnecessary to "stipulate for it; it passes without a word spoken; for it is "a necessary incident of every contract not only of insurance, "but of indemnity.* * * * This cession or abandonment "which accompanies a settlement gives to the insurers a right "to all the advantages, direct and indirect, of ownership of the "thing insured. Not only may they take possession of, sell, or "otherwise dispose of the wreck or remains; but if the insured "is entitled in virtue of the ownership he had before to any "rights of action or recovery from third parties, as for a con- "tribution to general average * * * recovery of damages "against the wrong-doer in a collision suit, or the like, these "rights pass by the abandonment to the underwriter."

Hunton vs. The Phœnix Ins. Co., 1 Wash. C. C., 400: at page 405, the Court says:

"The abandonment amounts to a legal transfer of the right of the insured so as to enable the underwriters to pursue, to manage and to recover the property as effectually as if a regular deed had been made to them."

In Rogers vs. Hosack, 18 Wend., 319, in the Court of Errors, Judge COWEN, at page 331, says:

> "The ground taken is that until actual payment by the "underwriter, he has but an inchoate, conditional right, but I "find no countenance given to such a dictum in any book on "the law of insurance, nor any adjudged case. On the contrary, "all the authorities are that *the assignment becomes absolute* "*from the time of the abandonment.* It was not too strongly "put upon the argument. The deed of a man's farm could not "operate more clearly to change the legal right."

In Comegys vs. Vasse, 1 Peters, 193, Judge STORY says (p. 214):

> "The law gives to the effect of abandonment when accepted all the effects which the most accurately drawn assignment could accomplish."

Mellon vs. Bucks, 5 Martin, La. N. S., 371. The plaintiff, the owner of goods, sued the defendant, the owner of an unseaworthy ship. The plaintiff had abandoned to his insurance company and was suing it for the loss. The Court says:

> "By so doing he has divested himself of all title to the prop- "erty claimed in the present suit, and transferred it to the in- "surance company. At least, so far as his will was concerned "in the transaction. * * * We therefore conclude that *as* "*owner* he cannot maintain the present action.
>
> "If the abandonment was made under circumstances *which* "*legally authorized such a step* on the part of the insured, the "insurers being bound to indemnify him as for a total loss, "must be considered as having become owners of the property "which was abandoned *ipso facto* WITHOUT ANY FORMAL ACCEP- "TANCE, BUT MERELY AS A CONSEQUENCE NECESSARILY FOLLOWING "FROM THE NATURE OF THE CONTRACT OF INSURANCE."

In Mutual Safety Ins. Co. vs. the cargo of the Brig. *George*, Olcott, 89, BETTS, J., says:

> "The abandonment conferred on them [the insurers] every "interest and right in the ship possessed by her owners. They "take all title and authority of the assured, even the *spes recu-* "*perandi*."

The Atlantic Ins. Co. vs. Storrow, 5 Paige, 285: Goods delivered to the ship had been stolen before the ship sailed. The insured had abandoned to the underwriter, and had sued the company on its policy at law. The company offered to pay if the insured would give them the bills of lading and make suitable covenants that the remedy against the ship owner had not been impaired. It then appeared that Storrow had delivered up the bills of lading to the master to be canceled. The insurance company then brought the bill in Chancery.

Chancellor Walworth, affirming the decree, at p. 294, said:

"The contract of insurance is a mere contract of indemnity "to the *insured* against such losses as he may actually sustain "by reason of any of the perils insured against, and upon an "abandonment and payment, or upon a recovery as for a total "loss, the underwriters are entitled to subrogation, at least in "equity, to all the rights and remedies which the assured has "to the property which is not actually destroyed, *including* the "*spes recuperandi*, from any other source unless the underwriters "have relinquished that right by a stipulation in the policy."

Monticello, 17 How. U. S., 155:

"A contract with the insurer is in the nature of a wager be- "tween third parties with which the trespasser has no concern. "It is true that in courts of common law the injured party "alone can sue for a trespass, as the damages are not legally "assignable, and if there be an equitable claimant he can sue "only in the name of the injured party, whereas in admiralty "the person equitably entitled may sue in his own name."

Potomac, 105 U. S., 630, 634, GRAY, J.:

"But upon familiar principles often recognized by this "Court, the insurer acquires by such payment a corresponding "right in any damages to be recovered by the assured against "the wrong-doer or other party responsible for the loss, and "may enforce this right of action at common law in the name "of the assured, or when the case admits of proceeding in "equity or admirality, in his own name."

Mobile, &c., R. R. Co. vs. Jurey, 111 U. S., 594, WOODS, J.:

"The payment of a *total* loss by the insurer works an equit-

"able assignment to him of the property and all the remedies "which the insured had against the carrier for the recovery of "its value."

The Court continues:

"In Gails vs. Hailman, 11 Penn. Stat., 515, it was held that "'a shipper who has received from the insurer the part of the "loss insured against, may sue the carrier on the contract of "bailment, not only in his own right for the unpaid balance due "to himself, *but as trustee* for what has been paid by the in- "surer in ease of the carrier;' and upon the trial of such a "case the *Court will restrain the carrier* from setting up the in- "surer's payment of his part of the loss as partial satisfaction."

The Court further says:

"The authorities above cited, which relate to marine policies, "apply as well as the other cases cited, to the question in "hand, for in Hall & Long vs. R. R. Co., 13 Wall., 367, it was "held that there is no reason for the subrogation of insurers "by marine policies to the rights of the insured against a car- "rier by sea, which does not exist in support of a like subro- "gation in case of an insurance against fire on land" (p. 595).

In Hall vs. R. R. Co., the question before the Court was as to the rights under fire insurance, and the contention was that as there was no abandonment under fire policies that the rights of the insurers were different, and while concluding that the right of subrogation did operate in the fire policy the Court took occasion to say:

"It is a mistake to assert that the right of insurers in marine policies to proceed against the carrier of the goods *after* they have paid a *total* loss grows wholly, or even principally, out of any *abandonment* or other assignment of the chose in action." 1 Ph 420 - 4 Ed

And refers to Sec. 1723 of Phillips on Ins., who says:

"A mere payment of a loss, whether partial or total, gives the insurers an equitable title to what may be afterwards recovered from other parties on account of the loss.

"The *effect* of the payment of a loss is *equivalent in this respect to that of an abandonment.*"

The distinction claimed to exist between the fire and marine policy is important and results from the peculiarities of each contract and the *implications of law* therein.

1. In fire assurance there is no *abandonment* for either actual or constructive total loss.

The bricks of the burnt building, the residue of the burnt goods, belong to the insured owner and payment of a total loss means only the amount lost *less* the salvage.

2. In marine insurance the contract contemplates the insurer becoming the compulsory owner of the residue by abandonment in case of a technical total loss or by payment of a total loss.

A few other citations from Phillips shows this.

The same author, Sec. 1682, says: p 487 - 4 Ed

"*The claiming of a total loss is a sufficient expression of an intention to abandon.*"

And Sec. 1683: id

"*So the payment* of a total loss *operates* as an abandonment."

And at Sec. 1712: p 403 - 4 Ed

"Rights and interests identified with the insured interest in property go to the underwriters by abandonment, or by the assured receiving payment of a total loss, which is equivalent to an abandonment." p 402

Sec. 1710: "The benefit of a right of action accruing to the shipper on bills of lading or on affreightment for the pending voyage against the owners of the vessel passes to the underwriters by abandonment so far as the goods are covered by the policy."

Sec. 1711: "All claims against third parties on account of negligence or agency occasioning the damage to the subject or destruction of it by a peril insured against, *are assigned* to the underwriter by an abandonment."

Chesapeake Co. vs. Stark, 6 Cranch, 268, MARSHALL, C. J.:

"If the abandonment was unexceptionable, the property *vested* immediately in the underwriters."

The policy in this suit does not mention the right to abandon, except by limitation of the right in case of capture &c. (Record, p. 37).

Kattenbach vs. Mackenzie (1878), L. R., 3 Com. P. D., 471 :

BRETT, L. J. : "The doctrine of abandonment in cases of *marine* insurance arises where the assured claims for a total loss. There are two kinds of total loss, one which is called an *actual* total loss, another which in legal language is called a *constructive* total loss.

Abandonment, however, is applicable to the claim, whether it be for an actual total loss or for a constructive total loss. If there be anything to abandon, abandonment must take place. * * * With regard to *the notice* of abandonment, I am not aware that in any contract of indemnity, except in the case of contracts of *marine* insurance, a notice of abandonment is required. In the case of marine insurance where the loss is an actual total loss, no notice of abandonment is necessary, but in the case of a *constructive* total loss it is necessary, unless it be excused. How, then, did it arise that a *notice* of abandonment was imported into a contract of marine insurance?

"Some judges have said it is a necessary equity that the insurer in the case of a constructive total loss should have the option of being able to take such steps as he may think best for the preservation of the thing abandoned from further deterioration. I doubt if that is the origin of the necessity of giving a notice of abandonment. It seems to me to have been introduced into contracts of marine insurance, as many other stipulations have been introduced—by the consent of the shipowner and underwriter—and so to have become a part of the contract and a condition precedent to the validity of a claim for constructive total loss. The reason why it was introduced by the shipowner and underwriter is on account of the peculiarity of marine losses. These losses do not occur under the immediate notice of all parties concerned. A loss may occur in any part of the world." * * *

P. 478. "The only mode of abandonment in cases of marine insurance is to give *notice* of abandonment, and the assured is bound to give notice. It is the notice which is the symbol of the abandonment. That notice must be given within a particular time."

Castellain vs. Preston, L. R., 11 Q. B. D., 380 (Court of Appeals, 1883).

Vendor insured house in London, Liverpool & Globe Ins. Co. on March 25, 1878. He made a contract of sale of house and lands for £3,100 on July 31, 1878, pending which the house was, on September 25, 1878, damaged by fire £330, which was paid by insurance company, and vendee completed and paid full amount December 12, 1879. Plaintiff, assignee of insurance company, sued for £330. Judgment for defendant. (CHITTY, J., 8 Q. B. D., 613.) This judgment was reversed.

P. 386, BRETT, L. J.:

" The very foundation, in my opinion, of every rule which has " been applied to insurance law is this, namely, that the con- " tract of insurance contained in a marine or fire policy, is a " contract of indemnity and of indemnity only. * * *

" For instance, to speak of marine insurance, *the doctrine of* " *constructive total loss* originated solely to carry out the fun- " damental rule which I have mentioned. It was a doctrine " introduced for the benefit of the assured; for, as a matter of " business, a constructive total loss is equivalent to an *actual* " total loss, and if a constructive total loss could not be treated " as an actual total loss, the assured would not recover a full " indemnity. *But grafted upon* the doctrine of constructive " total loss came the doctrine of *abandonment*, which is a doc- " trine in favor of the insurer or underwriter in order that the " assured may not recover more than a full indemnity. The " doctrine of constructive total loss and the doctrine of *notice* " of abandonment were invented or promulgated for the pur- " pose of making a policy of marine insurance a contract of in- " demnity in the fullest sense of the terms. * * I have no- " ticed the doctrine of *notice* of abondonment for the purpose " of coming to the doctrine of *subrogation.*

" That doctrine does *not arise upon any of the terms of the* " *contract of insurance;* it is only another proposition which " has been adopted for the purpose of carrying out the funda- " mental rule which I have mentioned; and it is a doctrine in " favor of the underwriters or insurers in order to prevent the " assured from recovering more than a full indemnity; it has " been adopted solely for that reason.

" It is not, to my mind, a doctrine applied to insurance law

" on the ground that underwriters are sureties. *Underwriters* " *are not always sureties.* They have rights which sometimes " *are similar to the rights of sureties,* but that again is to pre- " vent the assured from recovering from them more than a full " indemnity.

" But it being admitted that the doctrine of subrogation is to " be applied, merely for the purpose of preventing the assured " from obtaining more than a full indemnity, the question is " whether that doctrine, *as applied* to insurance law can be in " any way limited. Is it to be limited to this, that the under- " writer is subrogated into the place of the assured so far as to " enable the underwriter to enforce a contract or to enforce a " right of action? Why is it to be limited to that, if when it " is limited to that it will in certain cases enable the assured " to recover more than a full indemnity?

" The moment it can be shown that such a limitation of the " doctrine would have that effect, then, as I said before, in my " opinion, it is contrary to the foundation of the law as to in- " surance *and must be wrong.* * * And with the greatest " deference to my brother Chitty, it seems to me that that is " the fault of his judgment. He has by his judgment *limited* " this doctrine of subrogation to placing the insurer in the " position of the assured *only for the purpose of enforcing a* " *right of action* to which the assured may be entitled. In or- " der to apply the doctrine of subrogation, it seems to me that " the full and absolute meaning of the word must be used, that " is to say, THE INSURER MUST BE PLACED IN THE " POSITION OF THE ASSURED. Now, it seem to me " that in order to carry out the fundamental rule of the " insurance law this doctrine of subrogation must be carried " to the extent which I am now about to endeavor to " express, namely, THAT AS BETWEEN THE UNDERWRITER AND " THE ASSURED, THE UNDERWRITER IS ENTITLED TO THE AD- " VANTAGE OF EVERY RIGHT OF THE ASSURED, WHETHER SUCH " RIGHT CONSISTS IN CONTRACTS FULFILLED OR UNFULFILLED, OR IN " REMEDY FOR TORT CAPABLE OF BEING INSISTED ON OR ALREADY " INSISTED ON, OR IN ANY OTHER RIGHT, WHETHER BY WAY OF CON- " DITION OR OTHERWISE, LEGAL OR EQUITABLE, WHICH CAN BE OR " HAS BEEN EXERCISED OR HAS ACCRUED, AND WHETHER SUCH RIGHT " COULD OR COULD NOT BE ENFORCED BY THE INSURER IN THE NAME " OF THE ASSURED, BY THE EXERCISE OR ACQUIRING OF WHICH RIGHT

" OR CONDITION, THE LOSS AGAINST WHICH THE ASSURED IS INSURED " CAN BE OR HAS BEEN DIMINISHED.

" This seems to me to put the doctrine of subroga- " tion in the largest possible form, and if in that form, " large as it is, *it is short of fulfilling that which is the* " *fundamental condition. I must have omitted to state some-* " *thing which ought to have been stated.*" (*Note adopted* in Porter's Laws of Ins., p 218 (1884).

BOWEN, L. J., p. 403:

" CHITTY, J., goes on to discuss the case on the basis of what " he calls the principles of subrogation.

" I will add very little to what BRETT, L. J., has said about " that. *It seems to me that a good deal of confussion would be* " *caused if one were to suppose that insurers were in the posi-* " *tion of sureties.* A surety is a person who answers for the " default of another and an insurer is a person who guarantees " against loss by an event. The default or non-default of " another, as between that other and the person who is insured, " may diminish or increase the loss, but what the insurer is " guaranteeing is not the default of that person, he is guaran- " teeing that no loss shall happen by the event. And subroga- " tion is itself only the particular application of the principle " of indemnity to a special subject matter, and there, I think, is " where the learned Judge has gone wrong. He has taken the " term ' subrogation ' and has applied it as if it were a hard and " fast line, instead of seeing that it is part of the law of indem- " nity.

" If there are means of diminishing the loss the insurer may " pursue them, whether he is asking for contracts to be carried " out in the name of the assured, or whether he is sueing for " tort. *It is said* THE LAW ONLY GIVES THE UNDERWRITER THE " RIGHT TO STAND IN THE ASSURED'S SHOES AS TO THE RIGHTS " WHICH ARISE OUT OF, OR IN CONSEQUENCE OF, THE LOSS. I VEN- " TURE TO THINK THERE IS ABSOLUTELY NO AU- " THORITY FOR THAT PROPOSITION. The true test is, " can the right to be insisted on be deemed one the enforce- " ment of which will diminish the loss? * * * If the pay- " ment diminishes the loss, to my mind it falls within the appli- " cation of the law of indemnity. On this point I should like to " pause one instant to consider the definition which BRETT, L.

" J., has given. It does seem to me, that taking his language " in the widest sense, it substantially expresses what I should " wish to express, with only one small appendage that I " desire to make: I wish to prevent the danger of his definition " being supposed to be exhaustive, by saying, that if anything " else occurs outside it the general law of indemnity must be " looked at.

The result of all the above authorities, tersely stated, is that it is part of the very essence of the contract of Marine insurance that the insurer is to have the *spes recuperandi;* that by the nature of the contract a right to an assignment, upon a loss or abandonment, is incorporated into and is an inherent part of the transaction. The right is given by operation of law, is contemplated by the nature of the engagements the parties make, and is predicated upon the very term *insurance*, and whether it be effectuated by an instrument of cession, or by an abandonment under circumstances which justify the abandonment, the legal effect is the same. It has, as Judge Cowen and Judge Story have said, "all the effects which the most accurately drawn assignment would accomplish." It is in effect a contract for an assignment upon a future contingency. It is part of the contract of insurance, for, as is said in Atlantic Insurance Co. vs. Starrow :

" If it had appeared upon the trial of the suit at law that the " assured had received a compensation from the ship owner or " master, and that the assignment was made *for their* ben- " efit, merely to enable *them* to recover back the amount of the " insurance from the underwriter on the policy, there can be no " reasonable doubt that it would have been a good defense at " law, at least to the amount thus received."

And see

Carstairs vs. The Mechanics' and Traders' Ins. Co., 18 Fed. R., 473.

The principle was stated by MATTHEWS, J., in Mellon vs. Bucks, 5 Martin La., N. S., 371 :

" If the abandonment was made under circumstances *which* " *legally authorized such a step* on the part of the insured, the " insurers being bound to indemnify him as for a total loss, must " be considered as having become owners of the property which " was abandoned *ipso facto*, WITHOUT ANY FORMAL ACCEPTANCE,

" BUT MERELY AS A CONSEQUENCE NECESSARILY FOLLOWING FROM " THE NATURE OF THE CONTRACT OF INSURANCE."

Fourth Point. If force is given to the above contention, and if it be conceded that in the definition of the contract of insurance there is understood to be, as one of the terms thereof, an agreement that the insured shall, upon a loss or abandonment, assign his interest in the property, and his claims for any damage to it, to the insurer, then the next proposition follows logically that when the carrier inserts in his bill of lading a clause that the *insurance* shall be for his benefit, he does it with knowledge that the contract of insurance when made must contain an agreement that all the remedies against the carrier for negligence shall pass to the insurer on payment or abandonment.

In Sheppard vs. Taylor, 5 Peters, 689, seamen libelled *in personam* for their wages. The vessel had been captured and condemned, but on a subsequent petition to the Spanish Government a sum of money was awarded for what was stated to be an illegal capture, and the claim against the Spanish Government having passed by assignment from the insolvent respondents, the assignees were brought into the suit as holding the fund which was the substitute for the vessel. Counsel arguing, laid down the following proposition:

> " The owners of the property could assign only an interest " commensurate with their right, and only so far as the sailors' " lien gave the subject free to the owners had they any right. " The lien on the thing *is fixed* and intrinsic, and *announced by* " *the law on the very face of the thing to exist, and thus carrying* " *notice of it* to all who claim any benefit out of the specific " object.
>
> " No actual notice to the assignee was then necessary, *the* " *notification of the seamen's lien being furnished by the subject* " *itself*. The claim assigned being the effective proceeds of " that to which the lien adhered, *notice was imparted from the* " *very source of the assignee's title, and it was by law, and so* " *necessarily known to them, being published by the law as a legal* " *right to the whole world*."

STORY, J., at p. 712, says:

"The very circumstance of the derivation of their title from "the owners was sufficient to put them upon inquiry." And he held that the lien of the sailors for their wages attached to the fund in the hands of the assignees.

Duncan vs. Jaudon, 15 Wall., 176.

Fifth Point. We then have the familiar case of an assignor attempting to impair the rights of his assignee by dealing with a party having notice of those rights.

Welch vs. Mandeville, 1 Wheaton, 233 (3 Peters' Cond., 535).

STORY, J.: "Courts of law, following in this respect the rules "of equity, now take notice of assignment of choses in action, "and exert themselves to afford them every support and pro- "tection not inconsistent with the established principles and "modes of proceeding which govern tribunals acting according "to the course of common law. They will not, therefore, give "effect to a release procured by the defendant under a covenous "combination with the assignor, in fraud of his assignee, nor "permit the assignor injuriously to interfere with the conduct "of any suit commenced by his assignee to enforce the rights "which passed under the assignment."

Within the authorities, it is sufficient that the party seeking to avoid the assignment should have enough notice to put him on inquiry.

Anderson vs. Van Allen, 12 John., 345. p 408-412

The whole doctrine is expressed in 2 Phillips on Ins., § 1715.

"The rights of an underwriter cannot be affected by any con- "tract made by the assured with another underwriter or any "other person, *except so far as the assured is supposed to reserve "the right of making such other contract*, and the underwriter "to subscribe the policy under an implied condition that the "assured may avail himself of such right." * * *

"Estrangin says that any convention between the owner and

" freighter cannot affect the rights of the insurer under an " abandonment."

Note to Pothier on Ins., N. 36.

Sixth Point. The legal effect of the abandonment being to transfer the title to all the property remaining to the insurer, and to transfer all rights and remedies for injuries to the property, which are regarded as choses in action, the position has been taken that the insurer's interests having to be enforced in the name of the assured, that he therefore stood in his shoes, and deriving, as it is said, his title from the assured, he took it, subject to all his contracts. This position, growing as it did out of a technical rule of the common law, cannot be availed of in a court of admiralty or a court of equity.

The brig *George*, Olcott, 89, BETTS, J., p. 93 : " If this complete substitution of the assurers should fail to confer also the capacity to sue at law in their own names, they would meet no such technical impediment in this Court."

Garrison vs. Mem. Ins. Co., 19 How., 312.

Suppose in this case, after the abandonment the vessel had proceeded on her voyage with the residue of the insured cargo on board, and through the negligence of her navigators had met with another accident by which this residue had been further injured or lost. The insurers, having accepted the abandonment, would then have been the legal owners of this residue, and as owners would have had a clear right to hold the carrier liable for all injury to it, although deriving their right through the same contract as they now sue under. The second injury would be to their direct and absolute ownership and right of property. There would be no longer any insurance for the carrier to hide behind. Such a result demonstrates that the rights of the insurer to the residue of the property are no higher than his rights and remedies against the carrier for destroying the other part of it. Upon the abandonment all the legal rights of the owner to a completion of the contract of the carrier vested in the insurance company, subject to the liens of the carrier for freight money, and to his right to hold the property for the purpose of earning the freight money.

Allen vs. Mer. Mu. Ins. Co., 44 N. Y., 439.
Hubbell vs. Gt. Western Ins. Co., 74 N. Y., 260.

Phillips on Ins § 1710

Seventh Point. One aspect of the question is presented in 2 Phillips on Insurance, Sec. 1650, where the separate rights of insurers of hull and of freight are considered. He says:

> " The fact that the underwriter on freight may be affected by " the circumstance of the ship, being also insured and aban- " doned, *is an irregularity* in jurisprudence. The doctrine " adopted in the United States is preferable in this case, as it " makes the irregularity less than it is under the English " doctrine." Citing:
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> Simonds vs. Union Ins. Co., 1 Wash. C. C., 443.
>
> And see
>
> Hubbell vs. Gt. West. Ins. Co., 74 N. Y., 260.
>
> And
>
> Hugg vs. The Augusta Ins. & Bank Co., 7 How., 595.

In the case of Sea Ins. Co. vs. Hadden (Mch., 1884), L. R., 13 Q. B. D., 706, the English Court of Appeals seems to have laid the foundation for following the American view of the law.

Lowndes on M. Ins., 227.

Arnold on Marine Insurance, Vol. 2, p. 972, says:

> " Our law, as fixed by the decisions, seems undoubtedly to " present this anomoly, that the assured on freight may, by " making a distinct contract with a third party, deprive the " underwriter on freight of the *salvage to which he would have* " *been entitled had no such contract been made.* In the United " States this inconsistency is sought to be avoided by making " an apportionment of the freight earned before and after the " event for which the abandonment on the ship is made." Citing:
>
> 3 Kent. Com., 333.
> United Ins. Co. vs. Lenox, 1 John. Cases, 377.
> United Ins. Co. vs. Lenox, 2 John. Cases, 443.
> Maine Ins. Co. vs. U. S. Ins. Co., 9 John., 186.
> 2 Phillips on Ins., §§ 1649, 1738–1742.

It is thus seen that the law of the United States is, that the contract made with the third party shall not affect the insurer to his damage, and that the third party making such contract, to wit, the insurer on the ship, while he would take the *uninsured* freight from the owner on an abandonment of the ship, yet where that

freight has been insured the rights of the insurer of freight are to be preserved, and it is immaterial whether the insurance on the ship or feight be effected first. Nor is it material that the insurer on freight should know whether the vessel had been insured, or *vice versa.*

Eighth Point. Reference to the contract shows that the insurance effected was not on account of whom it might concern, nor in any form which could entitle the carrier to claim that it was an insurance of his interest (Record, pp. 34–35). The certificates issued insured the individuals named in them, who were the shippers, and no one else.

Ninth Point. The cases which have considered the effect of such a stipulation are very few. They are:

Mer. Mut. Ins. Co. vs. Calebs, 20 N. Y., 176.
Rintoul vs. N. Y. Cen. R. R. Co., 6 Rep., 356; *Id.*, 17 F. Rep., 905; 20 F. R., 313.
The Hadji, 20 F. R., 313; 20 Fed. Rep., 875.
Carstairs vs. Mech. & T. Ins. Co., 18 Fed. R., 473.

In the Mercantile Mutual Ins. Co. vs. Calebs, the Court says:

"In this case it is not proved or found that the goods were lost through the *negligence* of the defendants," and consequently it became unnecessary for it to consider what effect such a finding would have had.

The Court then examined the effect of the abandonment to the underwriter, and said:

> "The abandonment has all the effects of an assignment by "the insured, whereby the assignee would become possessed of "all the rights against the carrier *which the insured possessed at "the time of the assignment* and *no more.*
>
> "The question then arises, *was the special contract between in-"sured and carrier a valid one.*" The contract exempted the carrier from negligence, and the Court holds that it was valid according to the New York cases, citing
>
> Dorr vs. N. J. St. Nav. Co., 1 Kernan, 485.

Having determined that the exemption of the bills of lading created a valid contract between the carrier and the owner of the property, and that by the assignment the insurer became the owner, possessed of the rights which the owner had against the carrier and no more, the Court had determined all the questions before it, but it further considered and discussed the case in another aspect. It says:

> "It is argued that this clause in the contract did not exempt
> "the carrier from liability to the plaintiff, *because* it was made
> "without their knowledge or consent, and was an attempted
> "fraud upon their rights," and answers this argument by stating "that the contract between the carrier and insured was
> "made before any insurance was obtained; that the plaintiffs
> "did not know of the contract when they issued their policies;
> "*that that was a matter between them and their insured.*"
>
> "If there was any fraudulent concealment of facts on the
> "part of the latter at the time they obtained their insurance,
> "*it would have avoided the policies*, and they would not have
> "been bound to pay the loss. If they paid it *voluntarily* they
> "are not entitled to be subrogated."

It will be observed that in these latter aspects of the case the mind of the Court is dealing with what it had established in its premises, to wit: That a valid contract had been made between the carrier and the insured; *valid not in respect to the right to obtain the benefit of the insurance*, but in respect to its exemption from liability, and that it construed the clause giving the benefit of the insurance to the carrier as in substance and effect a valid contract exonerating it from liability, and arrived at that conclusion by considerations expressed in these words:

> "Inasmuch as a carrier may insure against the risk which
> "they incur, though they may be liable to the owners, they
> "may recover against the insurers."

The case presented did not require the Court to determine, and it did not determine, that a carrier may insure against its own negligence. In its entire scope the opinion fails to consider what the nature of the contract of insurance was, and assumed that the contract having been made between the carrier and the owner *before* the insurance was effected, created a difference. This fact is brought

as a prominent feature into the opinion. Examined in the light of the authorities cited in these points, the contract of insurance which the owner was to give the carrier the benefit of would be the same contract, whether made before or after the shipment was made. The property was the same—the entire *ownership* remained the same, and the *rights* and *remedies* of the owner for an injury to it remained the same.

UNLESS IT CAN BE SAID THAT THE OWNER HAD BY A VALID CONTRACT WITH THE CARRIER DISQUALIFIED HIMSELF FROM MAKING THE ASSIGNMENT WHICH THE LAW CONTEMPLATES AS PART OF THE CONTRACT OF INSURANCE, THAT HE HAD IN EFFECT CONTRACTED WITH THE CARRIER THAT HE WOULD NOT ASSIGN TO THE INSURANCE COMPANY THE CLAIM HE WOULD HAVE AGAINST THE CARRIER FOR NEGLIGENCE, THIS SAME INSURANCE HAVING THIS AGREEMENT FOR AN ASSIGNMENT EMBODIED IN IT BY THE LAW, OPERATED TO PASS TO THE UNDERWRITER THE CLAIMS OF THE OWNER AGAINST THE CARRIER.

The further view of the Court, in the case of the Mercantile Mutual Ins. Co. vs. Calebs, that inasmuch as the carrier may insure against the risks which they incur, though they may be liable to the owner, they may recover against the insurers, has been adopted and extended by the Court in deciding this case.

Rintoul vs. N. Y. Cen. R. R. Co. (16 Rep., 356); *Id.*, 17 Fed. R., 905; 20 F. R., 313, is a decision by the District Judge of the District of Connecticut sitting in the Circuit Court for the Southern District of New York, where the Court held that the plaintiff, having received full payment from his underwriter, could not maintain the action, because the bill of lading contained a similar clause, and considered the case in the aspect of whether such a contract, so construed, is not an unjust and unreasonable exemption of the carrier from liability for negligence, and held that it was not, because there was no obligation to insure, and, therefore, no contract of exemption from liability for loss by negligence, nor unfair to the owner, because *not compulsory*, conceding that if insurance was obligatory such condition would be unfair.

He further examined the contract as bearing upon the rights of the insurers, and argues that if such contract is entered into without *fraudulent* concealment of the facts from the insurers (of which he says there is no evidence in the case), it cannot properly be con-

sidered unjust or unreasonable, *because* the insurance company obtains its remedy, not by virtue of a contract of its own *with the carrier*, but through the owner's contract, and its right depends upon, or is subject to, the agreement made by the owner with the carrier, which he is at liberty to make to suit his own interest, provided there is no fraudulent concealment from the insurers.

The vice of this argument is in supposing that the insurance is binding under such a contract. True, the owner may make such a *valid* contract with the carrier—not one opposed to public policy, such as releasing the carrier from liability for negligence—as he finds to his interest, *but* the insurance contract carries with it certain well defined rights either expressed on its face or implied by law, and if the owner gives up any right which the insurer is entitled to, it does not matter whether he do so before or after the loss, the insurance is *pro tanto* defeated.

Phillips on Ins., § 1715.
Carstairs vs. Mech. & T. Ins. Co., 18 F. R., 473.

And if the underwriter pay the full loss, he does so not under his contract of insurance but as purchaser.

In Foster vs. Van Reed, 70 N. Y., 26, the Court says :

" It is difficult to see how the insurer can be deprived of the " right to *subrogation when it is made a part of the contract that* " *it shall enjoy such right.* * * *

" The claim that as the mortgagor had an insurable interest, " and as Mrs. Plank (the assignor of plaintiffs who were insur- " ers to her of the premises covered by the mortgage), by her " declarations, prevented him from insuring on his own behalf, " she and her assigns are estopped from denying that the " moneys were to be and had been applied on the mortgage, is " also unfounded.

" This position is inconsistent with the idea that a contract " *may be entered* into between the mortgagee and the insurer by " which the insurer may be subrogated in the place of the " mortgagee.

" Be this as it may, if the mortgagee had entered into a con- " tract inconsistent with her right to assign the mortgage debt, " *as was provided, it would be a valid bar to any recovery upon* " *the policy, and being such bar to a recovery,* it is also a bar to " any claim that the debt has been extinguished *pro tanto.*

"*And as the company were under no obligation* to pay any loss "in this aspect of the case, the plaintiffs, by the assignment to "them, became the owners of the entire interest in the mort- "gage for the full face and value of the same."

In the case at bar, if the carrier had paid the loss and sued the insurance company, claiming under the bill of lading, would this Court hold it could recover, and if not, would it not be because the carrier stood in the shoes of the owner who had been paid? Legal jugglery is not the foundation of legal rights, and whether the carrier or owner sued the insurance company, or whether the owner was paid by the carrier or insurance company cannot change their respective rights.

Judge DYER in this case has gone into an examination of whether a common carrier has an insurable interest, and has adopted that as a test of the entire question, and having found that he had, concludes that this insurance, not effected by him, not for any other interest than the owners, enures to him. It is respectfully submitted that he has gone too far. If he had found that a carrier *could not insure*, the test would have been conclusive, for what could not be done directly, could not be done indirectly, but when that was not found it *did not* establish that this insurance covered the carrier. His liability was already limited by his bills of lading, and nothing was left but his responsibility for his own negligence, and that *as a risk* was not insurable by him.

Tenth Point. The great confusion that exists in some of the cases arises out of the use of the word subrogation, and the idea that the insurer is a surety, and has only the rights of a surety.

Castellian vs. Preston, L. R., 11 Q. B. D., 380.

As to cases of fire insurance, where the mortgagee has insured, see:

Waring vs. Loder (1873), 53 N. Y., 585.

Excelsior F. Ins. Co. vs. Royal Ins. Co. (1873), 55 N. Y., 352.

Foster vs. Van Reed (1877), 70 N. Y., 26.

Lastly: The decree of the District and Circuit Courts should be reversed and a decree ordered for libellants for $9,400 (Record, p. 33), and interest from July 24, 1874, with costs in all the Courts.

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Supreme Court of the United States.

THE PHOENIX INSURANCE COMPANY OF BROOKLYN,
Appellant,

vs.

THE ERIE AND WESTERN TRANSPORTATION COMPANY,
Appellee.

Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin, in Admiralty.

BRIEF FOR THE APPELLANT.

GEORGE D. VAN DYKE,
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BRIEF FOR THE APPELLANT.

The Phoenix Insurance Company, an insurance corporation organized under the laws of New York, filed a libel in the District Court for the Eastern District of Wisconsin, in admiralty, against the Erie & Western Transportation Company, a corporation organized under the laws of Pennsylvania, and engaged as a common carrier, in transporting freight to and from the port of Erie, Pennsylvania, on

the lakes The libel (Rec. 1–4) alleged that certain owners of grain delivered to said Transportation Company as such common carrier, aboard the propeller *Merchant*, one of its vessels then lying at the port of Chicago, Illinois, and about to depart for Erie aforesaid, shipments of grain to be carried by said Transportation Company, in consideration of a stipulated freight, to said Erie and there to be delivered for transshipment to their respective destinations, as follows: the *first*, A. M. Wright & Co., 16,325.34 bushels of corn of the value of $11,000.00, consigned to themselves at Liverpool, England; the *second*, Elmendorf & Co, 800 bushels of corn of the value of $600, consigned to themselves, partly at Bound Brook and partly at Newark, New Jersey, and the *third*, Gilbert, Wolcott & Co., 689.02 bushels of oats and 370.30 bushels of corn of the value of $600, consigned to themselves at Tamaqua, Pennsylvania.

That the Insurance Company insured said owners on said grain for said voyage against marine perils; (Libel, art. 7, 12, 17.) and after the loss hereinafter mentioned and upon abandonment and claim duly made, paid said owners respectively the full amount of insurance as for a total loss. (Libel, Art. 9, 14, 19.)

That the propeller departed from Chicago with said shipments, on said voyage, on the 24th July, 1874, but did not safely transport said grain; and on the contrary, by reason of the unseaworthiness of said propeller and the negligence of those in charge of her, she was stranded on the western shore of Lake Michigan, and said grain greatly damaged. (Libel, Art. 9, 14. 19.) That all of said shipments were jettisoned and pumped overboard in the effort to recover said propeller and the remainder of her cargo, excepting 5,188 bushels of said corn, which in a wet and perishable condition and unfit for reshipment, was brought into the port of Milwaukee, Wisconsin, and there sold by

the Transportation Company for $1037.60; which proceeds said Transportation Company received and retained, and paid no part thereof to the Insurance Company. (Libel, Art. 21.)

The libel also alleged that the Transportation Company owned and used in its business of a common carrier, certain other vessels which touched at said Milwaukee, and was possessed of other personal property within said Eastern District of Wisconsin. (Libel, Art 22.)

The prayer of the libel was for a decree for damages and interest, and for a citation requiring the Transportation Co. to appear, and process of attachment against its property within said District.

The libel was duly verified, and with it was filed an affidavit (Rec. p. 6), setting forth in substance the facts alleged in the libel, and the usual stipulation to pay costs and abide the decree of the court.

Thereupon, by order of court, (Rec. p. 7) process of attachment was issued, and the marshal executed it by seizing the steamer *Alaska*, one of the Transportation Company's vessels found within the District. (Rec. p. 9.)

The Transportation Company appeared as claimant of said steamer and filed a claim, (Rec. 9) which recites that the appearance is special, not general, and merely for the purpose of protesting against the process and its service, and procuring the release of the steamer; at the same time it filed two stipulations (Rec. 11, 12) in the usual form, one for costs the other to answer the decree, both of which recite that it appears and submits itself to the jurisdiction of the court.

Upon the filing of these stipulations the steamer was discharged from custody.

Afterwards the Transportation Company filed an additional stipulation (Rec. 29) to answer the decree, containing

a like recitation, that it appeared and submitted itself to the jurisdiction of the court (Rec. p. 29)

The Transportation Company answering (Rec. 13) denied the material allegations of the libel, and further alleged (Ans. art. 11, 16, 18) in substance, that the propeller *Merchant* being in all respects seaworthy and laden with property, parts of which was the grain in the libel mentioned, started on a voyage from Chicago to Erie about midnight of July 24th, 1874, and at about *half past nine o'clock* the next morning in a dense fog struck upon rocks on the west shore of Lake Michigan and by so striking was caused to leak, and part of her cargo became wet and it became necessary to jettison a part. That a portion thereof, to-wit: 5188 bushels of corn was brought into Milwaukee, Wisconsin, on or about July 31st, 1874, in a wet and perishable condition and being unfit for reshipment was then sold for $1037.60 which the Transportation Company received and retained and was willing to pay to the parties entitled to receive it, since September 2d, 1874, when a general average adjustment was made of said losses and damage arising from said propeller being on the rocks as aforesaid (Ans. art. 21.) The answer further alleged (Ans. art. 25, 28, 31,) that said shipments were made under contracts, which are exhibited, wherein and whereby said Transportation Company, for stipulated freights, contracted to transport said shipments from Chicago, that of A. M. Wright & Co. to Philadelphia, Pennsylvania, and the other two to their respective destinations above given, and there to deliver the same; and that the course of business required that the part of the transportation beyond Erie should be performed on land and by means of railroad cars; and the answer insists that, therefor, the causes of action for the breach of such contracts, if any exists, are not of admiralty and maritime cognizance. (Ans., art. 34, 35, 36.)

The answer further alleged that in and by said contracts it was provided that said Transportation Company should not be liable for any loss or damage to said shipments by fire, collision or the dangers of navigation while on the lakes; and that said loss and damage to said several shipments was by, and caused by the fog aforesaid and perils of navigation while on lake Michigan, and not by any fault or unseaworthiness of said propeller, or any incompetency, carelessness or negligence on the part of those engaged in her navigation.

The answer (Art. 25, 27; 28, 30; 31, 33) further alleged that in and by said contracts it was provided that in case of any loss, detriment or damage done to or sustained by said property during the transportation thereof from Chicago to Philadelphia and other places as aforesaid, whereby any legal liability or responsibility should or might be incurred, that company only should be held answerable therefor in whose actual custody the same might be at the time of the happening of such loss, detriment or damage, and the carrier so liable should have the full benefit of any insurance that might have been effected upon or on account of said shipments. That the Transportation Company had the actual custody and was the carrier of said shipments at the time of said loss and damage; and if any liability arose for or on account of said loss or damage, it was alone answerable therefor, and by reason of the provision of the contracts last above mentioned it was entitled to, and at the time of filing the libel had the full benefit of the insurance mentioned in the libel, if any such was made.

The answer also insisted upon the objection to the process of attachment. (Art. 37.)

The District Court, after a full hearing, overruled the objection to the process of attachment (following *Atkins* v.

Fiber Disintegrating Co., 18 Wal., 272) and holding that the causes of action alleged were of admiralty and maritime jurisdiction, made a decree (Rec. 31) in favor of the Insurance Company for $1.037.60, being the proceeds of the wet grain sold at Milwaukee. The court, although it found as a fact that the loss of the grain was caused by the negligence of those in charge of the navigation of the propeller denied the right of the Insurance Company to recover damages for the loss of the grain of the Transportation Company, by reason of the stipulation respecting the benefit of insurance above mentioned. The opinion of the District Judge is reported in 10 Bissell, 18.

From this decree the Insurance Company duly appealed to the Circuit Court, and after a full hearing (Rec. 32) on which the Transportation Company was heard in support of the decree below, the Circuit Court substantially affirming the decree below, made a decree (Rec. 32) in favor of the Insurance Company for $3,776 64, being the amount of the general average contribution due the owners of said grain.

And the Insurance Company now brings the cause to this court by appeal; and for the purpose of this appeal the Circuit Court made findings (Rec. 133–41) in substance as follows:

1. That the Insurance Company was a corporation as alleged.

2. That the Transportation Company was a corporation as alleged and engaged in business as a common carrier and was proprietor of a line of propellers running between Erie and lake ports, designated as the Anchor Line, one of which was the *Merchant*.

3. That on the 24th of July, 1874, at Chicago, Illinois, A. M. Wright & Co., Elmendorf & Co. and Gilbert Walcott & Co., being the owners of the quantities of grain and

of the values as alleged, caused the same to be shipped aboard said propeller *Merchant*, then lying at Chicago and about to depart for Erie, said shipments to be transshipped at Erie and forwarded to their destinations alleged in the libel.

4. That on said day the Insurance Company, at the request and expense of said shippers, respectively, insured them against loss or damage to said shipments from perils of the sea, etc., and issued to them, respectively, certificates of insurance all similar in form, and the following is a copy of the one issued to A. M. Wright & Co.:

No. 627. $8,000.

THE PHOENIX INSURANCE COMPANY, NEW YORK.

CHICAGO, July 24, 1874.

This certifies that A. M. Wright & Co., insured under and subject to the conditions of open policy No. 2,263 of the Phoenix Insurance Company, in the sum of eight thousand dollars, on corn on board prop. Merchant at and from Chicago to Erie. Loss payable to assured order hereon and return of this certificate.

Assets, $2,000,000.

CHAS. E. CHASE, *Agent.*

[Endorsed.] A. M. WRIGHT & Co.

The policy of insurance in said certificate referred to was in the usual open lake cargo form, insuring Chas. E. Chase, on account of whom it might concern, upon goods and merchandise to be laden on vessel or vessels, against perils of the sea, etc, and provided, (Rec. p. 38) "no shipment to be considered insured until approved and endorsed on this policy by C. E. Chase, Agent." And said shipments were so endorsed on said policy.

That during the evening of July 24th, 1874, said propeller completed the lading of said shipments, and about mid-

night departed on her voyage. That about ten o'clock [the answer avers 9:30 o'clock] the next morning said propeller, in a dense fog, was stranded on the western shore of Lake Michigan, *through the negligence of those managing the propeller*. That upon striking, said propeller filled with water and said shipments became damaged and wet. Assistance was obtained at Milwaukee, and a portion of the cargo consisting of flour on deck was lightered off and saved, and 12,000 bushels of said grain were pumped and thrown overboard in releasing said propeller from the beach, the same being wet, damaged and unfit for re-shipment; and 5,188 bushels in like condition were brought into Milwaukee in the hold of said propeller and were there sold for twenty cents per bushel, and the proceeds thereof, except $20.00, paid for lighterage, the Transportation Company retains.

6. That said shippers abandoned said shipments to the Insurance Company as a total loss, and executed to it written instruments of assignment all similar in form, and the one executed by A. M. Wright & Co. is as follows:

CHICAGO, August 19, 1874.

"For and in consideration of the sum of Eight Thousand and no one-hundreth dollars, the receipt whereof is hereby acknowledged, we do by these presents assign, transfer, cede and abandon to the Phoenix Insurance Company, all our right, title and interest, in and to the property hereinafter specified, and to all that can or may in any way be made, saved or realized from the damage or loss, reported to have occurred, by reason of which a claim of payment has been made by us; with full power to take and use all lawful ways and means, (at the risk and expense of Phœnix Ins. Co.) to make, save and realize the said property, to-wit: 16,325.34 bushels of corn, as per bill of lading

and invoice, shipped on board the propeller Merchant, bound from Chicago for Erie; and covered by insurance with the Phœnix Ins. Co., by open policy No. 2263, certificate No. 627, under date of July 24, 1874.

To the extent of the interest of the said Phoenix Insurance Co. in said property.

A. M. WRIGHT & CO."

7. The facts respecting the contracts of shipment were these: (Rec. p. 40.)

"On said 24th day of July, 1874, said shippers severally made verbal agreements with respondent for the transportation of said grain, whereby respondent, in consideration of certain stipulated freight, agreed to transport said several parcels of grain from Chicago to Erie *via* the lakes, and thence to forward them to their destination as aforesaid. It was tacitly understood that bills of lading would subsequently issue to said shippers for said shipments, but nothing whatever was said respecting the terms and conditions thereof, and especially nothing was said touching the terms and conditions particularly set forth in the twenty-seventh, thirtieth and thirty-third articles of respondent's answer. [The stipulation respecting the benefit of insurance.]

That after said property had been received on board, and said propeller had departed on her voyage, respondent delivered to said shippers, respectively, contracts, copies whereof, except certain signatures thereto, are annexed to respondent's answer, and marked Exhibits A., B. and C., respectively. That said contracts were received by said shippers without protest or objection, and they were signed in behalf of said firms of Elmendorf & Co., and Gilbert Wolcott & Co., but the one delivered to A. M. Wright & Co. was not signed by or on behalf of said firm of A. M. Wright & Co. Said contracts so delivered and signed were received without specially reading the terms and conditions contained

in those particular contracts, and the attention of said shippers was not directed thereto, nor was anything said respecting them, and no reduction of freight was made from the rate stipulated in said verbal agreements in consequence of said terms and conditions, or other consideration paid therefor, but the shippers knew the terms of said contracts or bills of lading, and had often before shipped goods by said line under similar contracts, or had every opportunity of knowing the contents of said bills of lading by repeatedly shipping goods under similar contracts."

From the facts as found, the Circuit Court made among others, the following conclusions of law: (Rec. p. 41.)

"1. That said receipts or bills of lading are the contracts by which the rights of parties are to be governed.

2. That thereunder respondent became liable to said shippers for the value of said shipments by reason of the negligent loss of the same, and that said shippers had right of action therefor.

3. That by the abandonments aforesaid libellant did not succeed to said rights of action of said shippers by reason of the stipulation contained in said bills of lading, in the words following, to-wit: 'It is further stipulated and agreed that in case of any loss, detriment, or damage done to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment, or damage, and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods.'"

ASSIGNMENT OF ERRORS.

First. The Circuit Court erred in its conclusion that the

receipts or bills of lading are the contracts by which the rights of the parties are to be governed.

Second. And in its conclusion that by the abandonments, the Insurance Company did not succeed to the rights of action of the shippers, by reason of the stipulation respecting the benefit of insurance.

Third. And in not rendering a decree in favor of the Insurance Company and against the Transportation Company for damages occasioned by the negligent loss of said shipments of grain.

BRIEF.

The points presented for consideration are:

1. The legal effect of the abandonments.

2. Notice thereof to the carrier from the derivation of its title.

3. The assured's inability to impair the rights of the insurer under the abandonments by dealing with the carrier having notice thereof.

4. The carrier's disability to contract for the benefit of the shipper's insurance.

5. The assured by the stipulation in the bill of lading have not defeated the abandonments.

POINT I.

THE LEGAL EFFECT OF THE ABANDONMENTS.

The abandonments had the effect of a legal transfer to the Insurance Company of the grain insured, operating retroactively and vesting the legal title thereof in the Insurance Company as of the moment of the causulty which occasioned the loss, and the *jus recuperandi* from the carrier, whose negligent act caused the loss, passed as an incident of the legal ownership of the grain.

In *Chesapeake Ins. Co. vs. Stark*, 6 Cranch, 268, C. J. Marshall, delivering the court's opinion, says: "The in-

formality of the deed of cession is thought unimportant, because if the abandonment was unexceptionable the property vested immediately in the underwriters and the deed was not essential to the right of either party. If the abandonment was legal, it put the underwriters completely in the place of the assured and Parker" (the assured's supercargo) "became their agent. When he contracts on behalf of the owners of the goods he contracts on behalf of the underwriters who have become owners, not on behalf of Stark" (assured) "who had ceased to be one."

See also *Columbian Ins. Co. vs. Ashby*, 4 Peters, 139, 143.

Patapsco Ins. Co. vs. Southgate, 5 id., 604, 622.

In *Comegys vs. Vasse*, 1 Peters, 193, Mr. J. Story, delivering the court's opinion, says: (p. 213.) "The law gives to the act of abandonment, when accepted, all the effect which the most accurately drawn assignment would accomplish. By the act of abandonment the assured renounces and yields up to the underwriter all his right, title and claim to what may be saved, and leaves it to him to make the most of it for his own benefit.

The underwriter then stands in the place of the assured and becomes legally entitled to all that can be rescued from destruction. This is the language of the elementary writers and is fully borne out by Mr. Marshall and Mr. Park in their treaties on insurance. * * * It is very clear that neither of these learned writers meant to confine these remarks to cases when the specific property itself or its proceeds were restored; for the whole current of their reasoning goes to show that whatever may be afterwards recovered, whether in the course of judicial proceedings or otherwise, as a compensation for the loss belongs to the underwriters."

In *Union Ins. Co. vs. Burrell*, Anthons' cases 128,

Spencer J. says: "The cession has a retroactive operation. It puts the insurers in possession of the property so ceded and of the proceeds thereof, as an incident. The property is as completely vested in them as if it had been the subject of a bill of sale," etc.

In *Mellon vs. Bucks*, 17 Martin Lou. R. 371, Matthews J, says: "If the abandonment was made under circumstances which legally authorized such a step on the part of the assured, the insurers being bound to indemnify him for a total loss, must be considered as having become owners of the property which was abandoned, *ipso facto*, without any formal acceptance, but merely as a consequence necessarily following from the nature of the contract of insurance." Such abandonment, without acceptance or payment of the loss, was held in that case to divest the interest of the owner of goods insured so that he could not sue the master and owners, as carriers, for their omissions to transport the goods.

In *Rogers vs. Hosacks' Ex'rs*, 18 Wend., 319, Cowan J. says: (p. 331–332.) "It was not too strongly put upon the argument; the deed of a man's farm could not operate more clearly to change the legal right." And quoting *Mellon vs. Bucks*, he says Matthews J. "speaks the sense of all the books."

See also *Mut. I. Co. et al. vs. Cargo of Ship George, etc.*, Olcott, 89, 93.

Prop. Monticello, 17 How., 152, 155–6.

Arnould on Ins. (*Perkins Ed.*) *1178, *1179, *1180.

Emeregon (*Meredith*). Sec. VI., p. 648.

3 Kent, **318*.

The transfer is completely, instantly and irrevocably

effected by notice of abandonment, duly given or accepted, irrespective of payment of the loss, and notwithstanding the policy stipulates for thirty days after proof of loss, within which to pay.

Rogers vs. Hosack's Ex'rs. 18 Wend. per Cowan J., p. 331-333.
The Manistee. 5 Bliss (C. C.), 381. S. C. 7 Bliss (C. C.), 35.
Mellon vs. Bucks, 17 Mart. Lou. R., 371.
Bradlie vs. Maryland Ins. Co. 12 Pet. 378.

And the abandonment operates retroactively; it relates back at least to the moment of the causulty which occasioned the loss.

Mr. Justice Johnson says in his dissenting opinion in *Columbian Ins. Co. vs. Catlett*, 12 Wheaton, at p. 400: "The abandonment had the same effect as if the owner and insurer had been on board and the abandonment made at the time the misfortune occurred."

Union Ins. Co. vs. Burrell. Anth. Cas. 128.
Union Ins. Co. vs. Scott. 1 Johns. 160, 110.
Smith vs. Man'fg Co. 7 Metcalf, 453.
Sun Mut. Ins. Co. vs. Hall. 104 Mass., 507.
Arnould on Ins. (Perkins Ed.) *1178 and note (*s.*)
2 Philips on Ins. § *1708.*
*3 Kent, *318.*
Stewart vs. Greenock Mar. I. Co. 2 H. L. Ca., 159.

Emeregon (Meredith's Ed. p. 686) says: "The abandonment has a retroactive effect as against the insurers, who, to the extent of the interest insured, are presumed to have been, *from the beginning*, owners of the thing insured." And Marshall (p. *601) says the same.

Equitable subrogation is an incident of every contract

of indemnity, and follows upon settlement of partial or total losses under marine or fire policies.

Garrison vs. Memphis I. Co. 19 How. 312, 314, 317.
Hall & Long vs. Railroad Co. 13 Wall, 367.
Mobile, etc., R'y Co. vs. Jurey. 111. U. S., 594.
The Atlas. 93 id., 310.
The Potomac. 105 id, 633-4.
Insurance Co. vs. Stinson. 103 U. S. 28.

The *vendition* by abandonment, however, is peculiar to marine insurance, and differs radically from equitable subrogation. The vendition by abandonment arises *ex contractu*, and is as much a part of the contract of marine insurance as if set forth in the policy. (*Marcardier vs. Chesapeake I. Co.* 8 Cranch, 39.) Equitable subrogation is a creature of equity, dependent not at all upon privity of contract, but worked out through the rights of the creditor or owner.

Abandonment passes the *spes recuperandi* as an incident of the property transferred; equitable subrogation is not incident to the transfer of any property.

The transfer by abandonment is completely effected by notice of abandonment rightfully given or accepted, irrespective of payment. No equitable subrogation takes place until the creditor or owner has been completely paid and satisfied.

The transfer by abandonment operates retroactively and passes the subject of the insurance or its remains, with the *spes recuperandi*, as of the moment of the casualty which occasioned the loss. Equitable subrogation does not operate retroactively, but merely substitutes the insurer, as a surety, in the place of the assured at the time the assured is fully satisfied. These distinctions between

equitable subrogation and the vendition by abandonment must be kept in mind.

In this aspect, the policy of marine insurance may be likened to a conditional bill of sale; a contract that, in the event the subject of the insurance shall be injured by a peril insured against to an amount exceeding half its value, the assured shall have the right to transfer it to the insurer, vesting the legal title in it as of the moment of the casualty which occasioned the loss, and recover the insurance money as the price of the property so transferred. Regarded as legal owner at the time of the loss or damage, by relation back, the insurer is in effect the party injured by the negligent act of the carrier, and as an incident of the legal ownership of the property thus transferred, the insurer takes the *jus recuperandi* against the negligent carrier who occasioned the loss.

POINT II.

THE CARRIER HAD NOTICE OF THE ASSURED'S RIGHT OF ABANDONMENT AND THE LEGAL EFFECT THEREOF, FROM THE DERIVATION OF ITS TITLE.

The right of abandonment having the legal effect mentioned, and the right of the insurer in virtue thereof to enforce the *jus recuperandi* against the negligent carrier, are rights inherent in the policies, and are announced by law on the very face thereof to all claiming any benefit thereunder.

In *Shepard vs. Taylor*, 5 Pet. 675, seamen sought to enforce their claim for wages against a fund awarded by Spain for the illegal seizure of the vessel, and claimed by assignees, who alleged that they were bona-fide purchasers without notice. Mr. J. Story, delivering the opinion of the court (on p. 712), says: "The very circumstances of the deri-

vation of their title from the owners, was sufficient to put them on notice." And the court holds that the fund in the hands of the assignee was subject to the seamen's claim.

Notice from the derivation of title is of the most conclusive nature.

See, generally, the authorities collected in note in Leading Cases in Eq., White & Tudor, (4 Am. Ed.) vol. II. part I, p. 189–192.

POINT III.

THE ASSURED CAN NOT IMPAIR THE RIGHTS OF THE INSURER UNDER THE ABANDONMENTS BY DEALING WITH ONE CHARGED WITH NOTICE THEREOF.

The abandonments were authorized by the policies from their inception, and, when rightfully made, operated retroactively, vesting in the insurers the *jus recuperandi* from the negligent carrier, as an incident of the ownership of the property. The carrier is conclusively presumed to have known this, when stipulating for the benefit of the insurance, and the proposition contended for is simply an application of the familiar rule, that an assignor cannot impair the assignee's rights by dealing with one having notice.

Welch vs. Mandeville. 1 Wheaton, 233.
Andrews vs. Beecker. 1 Johnson's cases, *411 and note to 2d Ed.

Hart et al. vs. Western R. R. Co., 13 Met. 99, was an action founded on a statute, prosecuted by an underwriter in the name of the assured against a railway company, to recover the amount of the loss sustained by a fire, alleged to have been communicated to a dwelling house by a locomotive. The nominal plaintiffs executed an instrument declaring that they had received payment of the insurance

company, and fully releasing all claim which they might have against the defendants on account of said loss. C. J. Shaw held the formal discharge not a bar to the action.

To the same effect see:

Monmouth Ins. Co. vs. Hutchinson. 21 N. J. Eq. 107.

Con. F. I. Co. vs. Erie R. Co. 73 N. Y., 399.

In other words, our proposition is that a policy insuring the owner's interest in goods in the possession of a carrier is an absolute and independent contract, enuring to the benefit of the owner alone, and he cannot give the benefit of such insurance to another in any way prejudicial to the rights of the insurer without its consent. To permit the assured so to do, would be to permit one party to a contract to modify it without the other's consent.

In *Steele & Co. vs. Ins. Co.*, 17 Pa. St. 290, an attempt was made to extend a policy covering a carrier's insurable interest to the owner's interest as well—the converse of the situation in the case at bar. The court (p. 298) says: "All the authorities go to show that the intention of the party effecting an insurance, at the time of doing so, ought to lead and govern the future use of it, and that no one can, by any subsequent act, entitle himself to the benefit of it without showing his interest was intended to be embraced by it when it was made. * * * The nature of the transaction must be fixed at the time of insurance, and cannot be changed by subsequent consent of the assured without authority of the underwriter."

Mr. Philips, in his treatise on insurance (Sec. 1715), says: "The rights of an underwriter can not be affected by any contract made by the assured with another underwriter or any other person, except so far as the assured is supposed to reserve the right of making such other contract, and the

underwriter to subscribe the policy under an implied condition that the assured may avail himself of such right.

He says (citing Pothier Ins. note 36): "Estrangin says that any convention between the owner and freighter cannot effect the rights of an insurer under an abandonment."

In *Columbian Ins. Co. vs. Catlett*, 12 Wheaton, 383, the question was presented whether freight was a charge on the salvage of cargo in the hands of the underwriter, and it was held that it was not. Mr. Justice Story, delivering the opinion of the court, says: "As between the owner of the ship and the owner of the cargo, the former has a lien upon the cargo for all freight which becomes due and payable to him, whether it be full or pro rata freight. But freight is a charge on the cargo against which the underwriters do not, in any event, whether of abandonment with salvage or of partial loss, undertake to indemnify the owner of cargo. In order to obtain the salvage, when in the hands of the ship owner, it may become necessary for the underwriters to pay the amount of freight, for which they have a lien, as it may to pay any other charge created by the act of the owner of the cargo. *But this does not change the nature or extent of the responsibility of the underwriters*; as between themselves and the insured they have a right to deduct the amount so paid from the loss or recover it in any other manner as money paid for the use of the latter."

In *Atlantic Insurance Co. vs. Storrow*, 1 Ed. Ch. R. 621., s c. 5 Paige 285, the assured abandoned the shipment and brought action for a total loss on the policy, and during the pendency of the action, or before its commencement, received from the carrier satisfaction for the loss, and surrendered the bill of lading and assigned the policy for the benefit of the carrier.

The insurance company thereupon filed its bill in equity,

setting forth these facts, praying an accounting respecting the money received of the carrier and an injunction restraining the action on the policy; and the relief was granted.

McCoun V. C. (1 Ed. Ch., 627) says: "If the assured, himself, cannot receive payment of the underwriter for a total loss and at the same time retain the hope of recovering the specific property or the right of compensation from a third person, by whose misconduct or fault the loss has happened (which it is very certain he cannot for his own benefit), then it is equally certain he cannot transfer any such power of reservation with an assignment of the policy to another or relinquish it to the person ultimately liable to make good the loss to the prejudice of the underwriter."

Ch. Walworth (5 Paige 294) says: "On this question I fully concur with the vice chancellor in the conclusion at which he arrived, and also as to the reasons and weight of authority upon which his decision was based." And he adds that the *spes recuperandi* passes on abandonment "*unless the underwriters have relinquished that right by a stipulation in the policy.*"

An analogy may be borrowed from a case where ship and freight are insured under different policies.

Thus it has been held that the abandonees of the ship were entitled, by reason of the transfer, to the subsequent earnings of freight upon performance of her voyage, although the freight was insured by another underwriter who, upon abandonment to him, paid a total loss.

2 Phillips on Ins. Sec. 1649.

Arnould on Ins. *1152.

Atlantic Ins. Co. vs. Storrow. 1 Ed. Ch. per the V. C., p. 625.

Marshall, in his treaties on insurance (vol. 2, p. *603),

says: "The underwriters upon the ship are not bound to take notice of any contract for freight, or the insurance of it, to which they are no parties. They are not obliged to accept a qualified abandonment; and an unqualified abandonment must transfer to them the entire property and its incidents."

An analogy may also be found when the several interests of mortageor and mortgagee are separately insured.

Thus in *Foster vs. Van Reed*, 70 N. Y., 19, the insurer of the interest of the mortgagee brought action to foreclose the mortgage assigned to him on payment of the loss. The defence set up was that the mortgage contained the usual covenant for insurance on the part of the mortgageors and in default thereof that the mortgagee might make such insurance at the expense of the mortgageor. The mortgagee effected insurance covering his interest, and the mortgageor claimed the benefit of it, in satisfaction of the mortgage, in virtue of the covenant in the mortgage which authorized the mortgagee to make insurance at the mortgageor's expense.

Miller J., delivering the opinion of the court, says (p. 26): "It is difficult to see how the insurer can be deprived of the right of subrogation, when it is made a part of the contract that it shall enjoy such right, and *whether the company knew of the agreement in the mortgage at the time of issuing the policy, or assented to it, or otherwise, makes no difference;* for in either case the contract between Mrs. Plank (mortgagee) and the company is unaffected by it."

The policy in that case contained a clause that "in case of loss the assured should assign an interest in said mortgage equal to the amount of loss paid"; in the policy in the case at the bar the right of abandonment, with its legal

incidents was implied by law, and was as much a part of the contract as if set out in express terms.

See also—

Carpenter vs. Providence Ins. Co. 16 Pet., 495, 506.

Phillips on Ins. § 296.

Bank of S. Carolina vs. Bicknell et al. 1 Cliff. (C. C.) 85 per Mr. J. Clifford, p. 88.

Applying the foregoing principles to the case at bar, it seems clear that the policy was an absolute and independent contract between the insurer and the owners of the grain, covering their insurable interest alone, founded upon the ultimate and primary liability of the carrier for negligent transportation, and importing the right of abandonment.

Nothing in the policy or certificates issued thereunder, relinquishes the insurer's right, on abandonment, to insist on a transfer of the *spes recuperandi* against the negligent carrier. Nowhere is it found that the insurer has consented that its right under the abandonments shall be impaired by any application of the insurance made by the insured.

C. E. Chase, who issued the certificates, could not so consent, because his authority to act for the Insurance Company did not extend beyond issuing the certificates and entering them on the open policy. He had no authority to vary the legal import of the policy, nor did he assume so to do. No other agent of the Insurance Company even knew of the stipulation until after the abandonment was accepted, much less consented to it.

The stipulation in the bills of lading respecting the benefit of insurance having been made between parties charged with notice of the insurer's rights and without its privity

or consent, is *res inter alios acta*, and the insurer is unaffected by it.

POINT IV.

THE CARRIER'S DISABILITY TO CONTRACT FOR THE BENEFIT OF THE SHIPPER'S INSURANCE.

The Transportation Company, as a common carrier, received the property aboard its propeller *Merchant* for transportation (Find 2 and 3, Rec. 33); and the liability sought to be enforced arose "*through the negligence of those managing the propeller.*" (Find 5 Rec., 39, Libel Arts. 8, 9, 13, 14, 18 and 19.)

This liability does not arise *ex contractu*, but is annexed to the calling of the common carrier by a positive rule of law, and the carrier cannot, by contract with those who employ it, divest itself of this liability.

This court, in *Bank vs. Adams Express Co.*, 93 U. S., on p. 181, says: "The duty of a common carrier is to transport and deliver safely. He is made by law an insurer against all failure to perform this duty, except such failure as may be caused by the public enemy or what is denominated the act of God. By special contract with his employees he may, it is true, to some extent, be excused if the limitations of the law reasonable, and not inconsistent with sound public policy. It is agreed, however, that he cannot, by any contract with his customers, relieve himself from responsibility for his own negligence or that of his servant; and this because such contract is unreasonable and contrary to legal policy. So much was finally determined in *Railroad Co. vs. Lockwood*, 17 Wall., 357." This disability of the common carrier is finally determined in many cases.

See also—

Caldwell vs. Express Co. 21 Wall., 266.

Railroad Co. vs. Pratt. 22 id., 123, 124.
Railroad Co. vs. Stevens. 95 U. S., 155.
Hart vs. Railroad Co. 112 id., 331, 338.

The shippers obtained the insurance for their own benefit and at their own expense (Find 4, Rec. 34); and no reduction of freight was made or other consideration paid by the carrier in consequence thereof (Find. 7., Rec. 41); whether the shippers insured or not the freight remained the same.

If this stipulation gives the carrier the benefit of the shipper's insurance, so as to satisfy its established liability for the negligence of its agents and servants in the management of its propeller, it seems to be within the rule of law "finally determined" in the cases above cited. It is clearly an attempt, indirectly and by a subtelly devised trick of the bill of lading, to obtain that which the law forbids, viz: A common carrier's exemption from liability for negligence, by contract with its employers.

The Hadji. 20 Fed. R. 875; s. c. 16 Fed. R. 861.
The Titania. 19 id., 101.
Peek vs. N. S. R. Co. 10 H. L. C. 473.

Does it not become a difficult task consistently to hold that, although the carrier cannot exact of the shipper insurance against its liability for the negligence of itself and its servants, yet it may, in and by the contract of affreightment, provide that it may resort to the shipper's insurance, or any other fund belonging to the shipper, to satisfy its admitted liability for the negligence of itself and its servants?

The case of *Cincinatti, etc., R'y Co. vs. Spratt,* 2 Duval (Ky.) 4, is directly in point. It was an action in the name of the shipper against the carrier; the carrier set up as a defense that the bill of lading contained a stipulation in re-

spect of the benefit of insurance, similar in form to the one in the case at bar; and, also, alleged that the shipper was insured, and the action was prosecuted in the interest of the underwriters. The court held the stipulation no defense, citing among other cases, *Yates vs. Whyte*, 4 Bingham's N. C., 272, in which (S. C., 5 Scott, on p. 652) Tindal, C. J., uses these significant words: "It would be *monstrous* to hold that the *wrongdoer* shall stand in even a better situation than the owner, by being permitted to take all the benefit of the policy without having paid the premium."

The test of the validity of the carrier's exception seems to be its reasonableness. If it is not just and reasonable it is void; because the carrier's exception of liability for the negligence of itself and servants is deemed unreasonable in the eye of the law, it is held void.

Another test of the reasonableness of the stipulation in question is its effect on the shipper's insurance. If valid, and having the legal effect claimed by appellee, the stipulation disables the assured to make a full abandonment, and such disability invalidates the insurance and releases the insurer. (*Carstairs vs. M. & T. Ins. Co.*, 18 Fed., R 473. *Watson vs. Ins. Co. of N. A.*, 1 Binn. 47. *Gracie vs. N. Y. Ins. Co.*, 8 Johns., 237, 244.

Is a carrier's stipulation in effect discharging the shipper's insurance just and reasonable? Could there be a more decisive test of its unreasonableness?

Upon this point the position taken by the Transportation Company, and which received the sanction of the court below, may be briefly stated as follows: (1) That the stipulation was not a limitation of the carrier liability. (2) That it is not contrary to public policy, although having the effect to screen the carrier from liability for negligence, because the carrier by a policy could have covered such liability.

1. The learned district judge says: (10 Biss. p. 33) "To give the carrier the benefit of the insurance it must be liable to the shippers for the loss. Liability is a prerequisite to a claim to the insurance. The agreement is that if the carrier shall be liable for the loss then it shall have the benefit of the insurance." A little further on (p. 34) he says: "With this agreement in force, on payment of the loss by the insurer, * * * * the loss would be satisfied by moneys to which the carrier, as between it and the insured, would be entitled."

In other words the position is, that the common carrier can, by accepting property for transportation for hire, assume a liability for the negligent loss of same, and at the same time and as part of the same act creating the obligation, exact and receive from the other party to the contract (if, perchance, he is or may thereafter be insured) that which amounts to a satisfaction of such future liability. In other words the shipper being insured, the carrier can wilfully destroy the property entrusted to his care, and then demand that the shipper's insurance shall satisfy its liability for its tort.

Such being the effect of the stipulation, it would seem to be not merely a limitation of liability, but utterly repugnant to the obligation to safely carry and deliver at destination.

Candee vs. West. U. Tel. Co. 34 Wis., 471.
Addison on Contracts. Ch. 8, Sec., 2, p. *512.

2. Another position was, that although the stipulation had the effect of screening the carrier from liability for negligence of itself or servants, it was nevertheless valid, because the carrier could have covered such liability by a policy of insurance against perils of the sea and recover under the maxim of *causa proxima non remota spectatur.*

The learned district judge says: (10 Biss., p. 35) "Coming, then, directly to the point in issue, a test of the validity of this stipulation would seem to be, could the carrier recover for a loss happening confessedly through his negligence upon a contract insuring against 'perils of the sea."

A distinction must be kept in mind between a common carrier's *insurable interest* and his authority to insure for the owner. For the owner the carrier can insure the goods he carries to their full value; and in case of loss, whether liable therefor or not, the carrier holds such insurance for the benefit of the owner. Such insurance is the owner's insurance, and when the owner has separately insured, it is double insurance.

Home Ins. Co. vs. Balt. Warehouse Co. 93 U. S. 527, 543.

Hooper vs. Robinson. 98 id., 528, 538.

The Sidney. 23 Fed. R., 88, 92.

Steele & Co. vs. Ins. Co. 17 Pa. St., 290, 299.

Hutchinson on Carriers. § 429.

Waters vs. Monarch Assur. Co. 5 Ell. and B., 870.

L. & N. W. R'y Co. vs. Glynn. 1 Ell. and Ell., 652.

North B. & M. I. Co. vs. London L. & G. I. Co. 5 Ch. D., 569.

Darrell vs. Tibbitts. 5 Q. B. D., 560.

The *insurable interest* of a common carrier in the goods he carries is limited to his lien thereon for freight and advances, and the risks he has assumed respecting them. He has no insurable interest respecting risks which do not cast a liability on him.

Hutchinson on Carriers. Sec. 429.

Angell on Carriers. (4 Ed.) Sec. 349 *a.*

I. Phillips on Ins. Sec. 424.

Steele & Co. vs. Ins. Co. 17 Pa. St., 290.

Joyce vs. Kennard. L. R., 7 Q. B., 78.

In the case at bar, the bills of lading except liability for loss or damage by the dangers of navigation, *i. e.*, perils of the sea. The risk of stranding by a *vis major*, or an accident, is a peril of the sea and is not born by the Transportation Company; (*Transportation Co. vs. Downer*, 11 Wall., 129) and, hence, being exonerated by the bill of lading from liability for perils of the sea, it had no liability in that respect to cover by insurance.

The Transportation Company, however, was liable for the negligence of itself and servants; and the proposed test (although it is not a test) of the validity of the stipulation respecting the benefit of insurance would be: Could the Transportation Company, as a common carrier, having no liability for loss by perils of the sea, legally insure its liability for a loss happening confessedly through its negligence?

The same public policy which forbids the common carrier to limit such liability by contract with its employes, should forbid his attempt to insure it *in se*. Knowledge on the part of the master and marines that their employers would be protected from the consequences of their neglect would encourage a relaxation of that degree of attention and vigilence so necessary for the safety of life and property at sea.

General M. Ins. Co. vs. Sherwood. 14 How. 35, per Mr. J. Curtis, p. 367-8.

Matthews vs. Howard Ins. Co. 1 Kernan, 1.

William vs. N. E. Mar. I. Co. 3 Cliff., 244, per Mr. J. Clifford, at circuit, p. 249.

McQuirk vs. The Penelope. 2 Pet. Ad. R., 276.

2 Pars. Mar. Law. p. 89, note 3.

Phillips on Ins. Sec. 211, 212, 906.

1 *Parsons Mar. Ins.* 531 note 1 and 533.

Marshall on Ins. Vol. 1. Ch. VIII, Sec. 1. p. 215.

3 Kent Com. *291.

Phœnix Ins. Co. vs. Cochran. 51 Pa., St. 148.

Citizens Ins. Co. vs. Marsh. 5 Wright (Pa) 386.

We have found no authority, holding that a common carrier, not being liable for loss by perils of the sea, can insure its remaining liability for negligence. And in none of the cases involving a carriers' insurance, does it appear that the loss happened by the negligence of himself or servants.

Walker vs. Maitland 5 B. & Ald. 171, does not involve a common carrier's insurance. By a local usage the risk of bringing produce in the West Indies from shore to the ship, as between the freighter and the ship owner, is born by the ship owner. The policy issued to the ship owner, covered this risk. Loss of produce happened while loading off shore, proximately by standing, remotely by the negligence of the crew, and the ship owner recovered the insurance.

The ship owner was in no sense a *common* carrier. At the date of this decision (1821) it was the policy of England to permit ship owners and bailees to exempt themselves from liability for negligence.

Maving vs. Todd (1815) I Starkie, 72.

Hutchison on Carriers, §§ 229, 230.

In *Crowley vs. Cohen*, 3 B & Ad. 478, the policy was construed to cover the carrier's liability for goods in transit in canal boats; but was expressly "warranted free of loss arising from plunderage, barratry or pilferage." The boat with the goods on board was *accidentally* sunk and the goods damaged.

Joyce vs. Kennard, L. R. 7 Q. B. 78. The policy covered a ship owner's liability to the owners of cargo for "losses, damages and accidents." A "loss, damage and *accident*" occurred, whereby the ship owner was liable.

In *Van Natta vs. Security Ins. Co.*, 2 Sanford, 290, the loss was by fire without any *evil practice* on the part of the assured (p. 491).

In *Chase vs. Washington Mutual Ins. Co.*, 12 Barb., 595, the insurance was generally of perils of the sea. The loss was by collision *without fault* on the part of the assured.

In *Savage vs. The Corn Exchange Ins. Co.*, 36 N. Y., 655-58, the loss was by stranding a tow, and the question of negligence was submitted to the jury on the whole evidence, and the court below charged the jury "that if the boat was placed in an unsafe position by the plaintiff or his agents having her in charge, against remonstrance, etc., then plaintiff could not recover—p. 658.

In *The Sidney*, 23 Fed., R. 91, the policy covered a carrier's liability, "but did not cover any negligence of the carrier, because such negligence was expressly excepted by the terms of the policy." (p. 94.)

None of these cases are authority for the position that a common carrier can insure its liability for negligence.

In the case supposed of a policy issued to the carrier covering its liability, no recovery could be had by proof of stranding merely; for if accidental, the carrier incurred no liability thereof. Hence, to show a loss, the carrier would be obliged to prove, not merely the stranding, but that it

was caused by the negligence of itself or servants, for which it was liable. The maxim of *causa proxima* properly applied, would oblige the carrier to go behind the stranding and show its liability for negligence.

Gen. Mut. Ins. Co. vs. Sherwood. 14 How. 315.

Assuming, for the purpose of argument, that the carrier by a policy issued to it directly could have lawfully insured its liability for negligent transportation, it does not necessarily follow that the stipulation contained in the bill of lading should for that reason be upheld.

The underwriter deals with the carrier on terms of equality, and the terms of its undertaking to indemnify the carrier for negligent transportation, and the premium demanded would be its own terms; not so the dealings of the shipper and the carrier. The carrier enjoys a sort of monopoly of the carrying business, and the shipper is, in a sense under duress, and is obliged to accept such terms as the carrier proposes. (*Railroad Co. vs. Lockwood*, 17 Wal. on p. 379. *Caldwell vs. Express Co.*, 21 Wal., 266). It is for protection of the shipper that public policy steps in and declares that unless the terms of the carrier are just and reasonable they cannot be upheld. And it has been repeatedly held that an agreement exacted by the carrier from the shipper tending to relieve the carrier from liability for the negligence of himself or his servants is not just or reasonable.

POINT V.

HAS THE ASSURED DEFEATED THE ABANDONMENTS BY THE STIPULATION IN THE BILL OF LADING RESPECTING THE BENEFIT OF INSURANCE?

1. The findings (Find 7, Rec. 40), do not find the *express assent* of the shippers to the stipulation in question,

and the findings, having the effect of a special verdict at common law (*The Adriatic*, 107 U. S., 512; *The Benefactor*, 102 U. S., 214, 218; *Sun Mutual I. Co. vs. Ocean Ins. Co.*, 107 U. S., 500) can not be helped out by implication.

Barnes vs. Williams, 11 Wheat, 415.
Hodges vs. Easton, 106 U. S., 408.

Nothing was said in the verbal agreement of shipment, made before the departure of the vessel, respecting insurance. The vessel completed the lading of the shipments during the evening of July 24th, and departed on her voyage about midnight, and stranded the next morning about 10 o'clock. (Rec. 39). After the departure of the vessel, presumably next morning, receipts, or bills of lading contained the stipulation in question, were delivered to the shippers, and received without objection and signed in behalf of two of them, but not by or on behalf of the principal shipper. They were so received and signed without reading them, and the attention of the shippers was not directed to the stipulation respecting the benefit of insurance, nor was anything said respecting it; nor was any reduction in freight or other consideration paid therefor. The receipts or bills of lading having been delivered after the carrier's duty had become fixed by acceptance of the goods, and after the vessel has taken the goods beyond the shipper's recall, and possibly after the loss, the assent of the shippers to an unusual stipulation, such as the one in question, to which their attention was not directed, and respecting which nothing was said, should not be presumed.

Bostwick vs. Balt. & Ohio Ry. Co., 45 N. Y., 712.
Baker vs. M. S. etc., Railroad Co., 42 Ill., 73, 77.
Strohn et al. vs. D. & M. Ry. Co., 21 Wis., 560.

Lawson's Contracts of Carriers, Sec. 114.
Mich. Cent. R. R. Co. vs. Boyd, 92 Ill., 268.
D. & M. Ry. Co. vs. Adams, 15 Mich., 458, 462.

In *N. J. Steam Navigation Co. vs. Merchants' Bank*, 6 How., 344, Nelson, J., says, (p. 382): "But admitting the right thus to restrict his obligations, it by no means follows that he can do so by any act of his own. He is in the exercise of a sort of public office, and has public duties to perform from which he should not be permitted to exonerate himself without the assent of the parties concerned, and this is not to be implied or inferred from a general notice to the public limiting his obligation, which may or may not be assented to. He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal; and we agree with the court in the case of Hollister vs. Nowlen, that if any implication is to be indulged from the delivery of the goods under the general notice, it is as strong that the owner intended to insist upon his rights and the duties of the carrier, as it is that he assented to their qualification. The burden of proof lies on the carrier, and nothing short of an *express stipulation by parole or in writing should be permitted to discharge him from duties which the law has annexed to his employment. The exemption from those duties should not depend upon implication or inference founded on doubtful and conflicting evidence; but should be specific and certain, leaving no room for controversy between the parties.*"

In *York Company vs. Cent. Railroad*, 3 Wall., on p. 113, this court says: "The owner of the goods may rely upon

this responsibility imposed by the common law, which can be only restricted and qualified when *he expressly stipulates* for the restriction and qualification."

The language of Mr. Justice Davis, in delivering the opinion of the court in the case of *Railroad Co. vs. Manufacturing Co.*, 16 Wall. 318, is very pertinent. After citing *N. J. Steam Navigation Co. vs. Merchants' Bank* (p. 6 How., 329), and *York vs. Central Railroad*, 3 Wall. 107, he says, (p. 329): "These considerations against the relaxation of the common law responsibility by published advertisements, apply with equal force to notices having the same object attached to receipts given by the carrier on taking the property of those who employ them into their possession for transportation. Both are attempts to obtain, by indirection, exemption from burdens imposed in the interest of trade upon this particular business. It is not only contrary to law, but a serious injury to commerce to allow the carrier to say that the shipper of merchandise assents to the terms proposed in a notice, whether it be general to the public, or special to a particular person, merely because he does not expressly dissent from them. If the parties were on an equality in their dealings with each other there might be some show of reason for assuming acquiescence from silence, but in the nature of the case this equality does not exist, and therefore every intendment should be made in favor of the shipper when he takes a receipt for his property with restrictive conditions annexed, and *says nothing* that he intends to rely upon the law for the security of his rights."

See also,

Railway Co. vs. Lockwood, 17 Wall., on p. 379.
Caldwell vs. Express Co., 21 Wall., on p. 266.
Railway vs. Stevens. 95 U. S., 655.
Insurance Co. vs. Railroad Co. 104 id., 146.

Mobile, etc., Railroad Co. vs. Jurey, 111 id., 584, 591.

Hart vs. Pa. Railroad, 112 id., 331.

The shipments were made and the receipts or bills of lading were issued at Chicago, Illinois. Although it is well settled that Illinois decisions on commercial questions, are not binding on this court, it is submitted that as part of the *lex loci* they should be considered.

Commercial Law in U. S. Courts, 12 Am. Law Reg., 473.

Rorer Interstate Law, p. 34.

Conflict bet. Fed. and State Decisions, 1 Am. Law Rev. (N. S.) 211–226.

Illinois and federal decisions are in accord. The case of *Western Transportation Co. vs. Newhall*, 24 Ill., 466, adopts the law as stated by this court in *N. J. St. Ng. Co. vs. Merchants Bank*, 6 How. 381; and Illinois courts have since followed it.

Illinois Cent. R. R. Co. vs. Smyser, 38 Ill., 355: holds that the usage in giving one form of receipt containing limitations is no evidence that the person habitually taking such receipt assented to the one in question.

In Erie & West. Trans. Co. vs. Dater, 91 Ill., 195 (S. C. reviewed, Cent. L. J. 293), the carrier proved, as in the case at bar, the previous acceptance of a large number of similiar bills of lading, and contended that assent to the terms of the bill of lading in question should be presumed from its acceptance without objection, especially as it was used in foreign or interstate commerce. The court answers the contention by saying: "The contrary rule to that contended for * * * has been so well established by the repeated and uniform decisions of this court, that we

must adhere to it as the settled doctrine of the court, although it may not be in harmony with the rule in other courts." And the court after citing the previous decisions of the court, says: "Nor do any of those decisions intimate that there should be any restrictions of the rule, as it is claimed there should be, to the case of other paper writings than bills of lading proper, such as notices, receipts, etc., and they must be taken as not to acknowledge any such distinction."

We call attention to the following reviews of the Illinois decisions:

Common Carrier's Contracts in Illinois, 8 Cent. L. J., p. 291.

Boskowitz vs. Adams Express Co. 5 Cent. L. J. p. 58 and note, and reply to same in 5 Cent. L. J. 134. S. C., 93 Ill., 523.

1 American Law Review, N. S. Note 432–41.

Contracts of Carriers, Lawson, Secs. 104–5, Note ft. p. 112.

Merchants' Dispatch vs. Theilban, 86 Ill., 71.

Hoadley vs. Trans. Co., 115 Mass., 304.

2. The Illinois Statute.

A Statute of Illinois entitled, "An act to *fix* the liability of carriers receiving property for transportation, approved March 27th, 1874, in force July 1st, 1874," provides as follows:

"Be it enacted" etc., "That whenever any property is received by a carrier to be transported from one place to another within or without this state, it shall not be lawful for such carrier to limit his common law liability safely to deliver such property at the place to which the same is to be transported, by any stipulation or limitation expressed in the receipt given for such property." Ch. 27, *Rev. St. of Illinois*.

The only construction which this statute has received is

in *Mather vs. Express Co.*, 9 Biss. C. C., 293; *Chic. & N. W. Railway Co. vs. Church*, 12 Bradw., 20, and *Myrick vs. Railroad*, 107 U. S., 108, and they give us little light on the question here presented.

The decisions of this court undoubtedly influenced the passage of this act.

Railroad Co. vs. Manufact. Co., 16 Wall. per Mr. J. Davis at p. 330.

Railroad Co. vs. Lockwood, 17 id. per Mr. J. Bradley at p. 368, citing *Stinson vs. N. Y. Cent. Ry. Co.*, 32 N. Y., 337.

This kind of legislation is not peculiar to Illinois. Many of the States have been driven to it.

Michigan—Comp. Laws 1871, p. 783, Sec. 2386. *1 How. St., Sec. 3418; Sec. 3328.*

Missouri—1 Rev. St., p. 95.

Mississippi—Mobile & O. Railroad vs. Franks, 41 Miss., 494.

Iowa—Laws 1866, C. 13, p. 121.
Code, Sec. 1307. See *McDaniels vs. C. B. & Q. Railroad*, 24 Iowa, 482.

Texas—Paschal's Dig., Art. 4258, construed in *Houston, etc., Ry., vs Burks*, 55 Texas, 323, and mentioned in *President, etc., of Ins. Co. N. A. vs. St. L. I. M. & S. Railroad Co.*, 9 Fed. R. 809, 810.

In construing this Illinois statute it should be regarded as a statute founded on public policy, and aimed to prevent fraud, and to protect life and property, and therefore to be construed liberally so as to promote the public policy, and prevent the wrong.

The title of the act is significant: It is "An act to *fix* the liability," etc.

The instruments in question come within its terms. They are "receipts given for the property"; by their very terms they are designated alternately receipts and bills of lading. "This receipt to be presented without alteration or erasure," etc. "In case of loss, detriment or damage to the property herein *receipted* for," etc.

The courts of Illinois have frequently termed these instruments, receipts. (See cases *ante*, p. 36-7). Strictly speaking these instruments are not bills of lading, but are receipts; they are not issued or signed by the master of the vessel.

1 Parson's Sh. & Ad. 186.
Abbott's Law Dic., 148.
The Delaware, 14 Wall., 579.
1 Parson's Mar. Law, 134.

This Illinois statute, construed as above suggested, we submit, certainly applies to this case, and should control the decision of this court.

McDaniel vs. C., B. & Q. Railroad, 24 Ia., 412.
Oates vs. National Bank, 100 U. S., 239, 246.

Especially should it be regarded favorably by this court, as its passage was evidently suggested by the decision of this court in *Railroad Co. vs. Manufac. Co.*, 16 Wall., 318.

Matters bearing upon the execution of a contract, are determined by the law of the place where the contract is made. If void there it is void everywhere.

Scudder vs. Union National Bank, 91 U. S., 406
Carrier's Contracts, Lawson, Sec. 211.
Hutchinson on Carriers, Sec. 140.
Wharton on Conflict of Laws, Sec. 429.
Pope vs. Nickerson, 3 Story, 484.

3. Properly construed the stipulation does not relate to the carrier's liability for the negligence of itself or servants.

Its terms are broad. They provide that "in case of any loss, detriment or damage * * * whereby any legal liability or responsibility may be incurred * * * the carrier so liable shall have the full benefit of any insurance," etc. Literally they include liability for negligence; they would also include a loss accruing from an intentional or willful act on the part of the carrier or its servants. They may, however, be operative without including liability for negligence; for the carrier's liability for loss by floods, thieves, pirates, etc., is not stipulated away.

The rule of construction of carrier's exceptions is settled in this court. In *N. J. St. Ng. Co. vs. Merchant's Bank*, 6 How., Mr. J. Nelson, speaking of the exception in that case, says: "The language is general and broad, and might well comprehend every description of risk incident to the shipment. But, we think, it would be going farther than the intent of the parties, upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for willful misconduct, gross negligence or want of ordinary care either in the seaworthiness of the vessel, her proper equipment and furniture or in the management of the master and hands."

And says Mr. J. Strong, speaking of the stipulation in *Bank vs. Express Co.*, 93 U. S., on p. 181: "The language is very broad; but it must be construed reasonably, and if possible consistently with law. It is not to be presumed the parties intended to make a contract which the law does not allow. If construed literally, the exception extends to all loss by fire, no matter how occasioned, whether occurring accidentally or caused by the culpable negligence of the carriers or their servants, or even by fire caused by acts of the carriers themselves. That it can be operate to such

an extent is not claimed, nor is it insisted that the stipulation can protect the defendant against responsibility to deliver the packages according to their engagement, when such failure has been caused by their own misconduct or that of their agents or servants."

See also—

Maynard vs. Syracuse, etc., R. R. Co. 71 N. Y., 180.

Holsapple vs. Rome & R. Co. 86 id., 275.

The Hadji. 16 Fed. R. 861, s. c. 20 id., 875.

The Titania. 19 id., 101.

Construed by these rules, this stipulation may be held to apply in all cases, except when the loss or damage to the goods is occasioned by the negligence of the carrier, its agent or servants. Such a construction, however, would not affect the right of recovery in this action in which negligence is found.

4. Does the stipulation necessarily relate to the shipper's insurance?

Literally it applies to "any insurance that may have been effected upon or on account of said goods" by any one, consignor, consignee, pledgee or bailee. But it may be operative without extending to the shipper's insurance; it may be limited to any insurance that may have been effected upon or on account of the goods *by the carrier*, at its own expense and by contract directly with an underwriter. Such construction is to be preferred; because it is more consistent with the presumed intention of the shipper, and with legal policy.

5. Assuming, for purpose of argument, that the stipulation relates to the shipper's insurance, what was its effect thereon?

It is indisputable that the policy in the case at bar is a contract insuring the interest of the shipper alone. The stipulation did not oblige the shipper to insure the carrier's interest and no policy has been obtained covering it. The stipulation did not constitute the shippers the carriers agents to procure insurance; in fact it did not oblige them to insure at all. It is not found that in obtaining their insurance, the shippers intended to provide indemnity for any except themselves: and the insurance obtained, from its very nature, presupposes the carrier's ultimate and primary liability for negligent transportation and by no possibility could it enure to the carrier's benefit.

It can not be maintained that the stipulation was an assignment legal or equitable, of any interest in the insurance to the carrier; for it contemplated that the assured should retain control of the insurance and collect it, which was fatal to any right of the carrier in the insurance.

Christmas vs. Russell, 14 Wall., 84.

Dillon vs. Barnard, 21 Wall., 439, 440.

Removal Cases, 100 U. S., 477.

Rogers vs. Hosack's Ex'rs., 18 Wend. per Cowan J., p. 334, & cases cited.

Minturn vs. Mnf'g Ins. Co., 10 Gray, 501.

Stearns vs. Quincy Mut. F. Ins. Co. 124 Mass., 61.

The most that can be claimed for the stipulation is that it is a sort of voluntary trust declared by the assured, without consideration, in favor of the carrier, inoperative as to the insurance, but applicable to its proceeds when received by the assured.

The stipulation was entirely without consideration, for no difference in freight was made whether the shipper insured or not.

Such a voluntary, optional trust, a court of equity would not lend its aid to enforce.

2 Story Eq. Ju. §§ 793 a; 973.
Ellison vs. Ellison, White & Tudor's, Leading Cases in Eq. vol. 1, part 1, p. (245) 382.

Relating solely to the *proceeds* of the insurance, it necessarily presupposes and authorizes an abandonment by the assured, having the legal effect mentioned; for without the abandonment no proceeds would be recoverable for any one's benefit.

In *Atlantic Ins. Co. vs. Storrow*, the Vice Chancellor says: (1 Ed. Ch., 624–5.) "Here I would observe that the abandonment was made by the ship-owner after he obtained the policy by assignment or he adopted the abandonment previously made by Mr. Storrow [the assured;] for he proceeded in the action at law for a total loss, and a recovery could only have been had to the full extent upon the ground of the subject matter of the insurance being actually abandoned to the complainant, and this was originally either the act of Boyd [assignee of the Policy] or became his by adoption."

The carrier, authorizing an abandonment by its stipulation, and tacitly encouraging the payment of the insurance by the insurer, can not afterwards exercise legal rights in opposition to such consent.

Swain vs. Seamans, 9 Wall., 254, 274.
Flannigan vs. Turner, 1 Black, 491.
Bigelow on Estopple, Ch. 19, p. 503, 511, note 2.
King vs. Fowler, 16 Mass., 397.

This voluntary trust, if enforcible, can not bar this action. Such trust can not be worked out in this action because trusts and accountings in respect thereof, are of equitable

jurisdiction, and can not be enforced directly or indirectly in admiralty.

Barnes vs. The James & Catharine, Baldwin 544

And moreover here there is no jurisdiction of the absent fund or the trustee who holds it.

The doctrine of circuity of action has no application. This doctrine does not effect causes of action even when arising on reciprocal covenants in the same instrument (1) when those covenants are independent and distinct and (2) when the measure of damages is not the same in respect of each.

Charles vs. Altin, 15 C. B., 46.
Alston vs. Herring, 11 Ex. (H. & G.), 822.
Gibson vs. Gibson, 15 Mass. 106, 112.

The stipulation respecting the benefit of insurance is separate and distinct from the duty of the carrier imposed by law or imported in the bills of lading. And, moreover, the measure of damages upon a breach of the carrier's duty to deliver safely, is the value of the goods at destination, with interest; and this is the rule even when the action is prosecuted by or on behalf of an insurer.

Mobile, etc., R'y Co. vs. Furey. 111 U. S., 585, 593

On the other hand, the measure of damage upon breach of the stipulation to give the carrier the benefit of insurance is not necessarily the same. It could not, in any event, exceed the amount of the insurance money received. It might be only the amount of the premium, as the carrier might have insured; and if with knowledge that the shipper's policy did not cover its insurable interest, it failed to take out insurance on its own account, a reasonable rule would limit its recovery to the amount of the premium.

Charles vs. Altin, 15 C. B., 46.
Dodd vs. Jones, 137 Mass. 322.

The doctrine of set-off is also inapplicable; it is a creature of statute, and no statute has extended it to admiralty proceedure.

Willard vs. Door. 3 Mason, 161, 171.

The carrier is estopped to claim set-off. Having authorized and adopted the abandonments by stipulating for the benefit of the proceeds of the insurance, the carrier should not be allowed to impair by set-off the rights of the insurer thereunder.

Moreover, this would be an exception to the rule of set-off, or circuity of action; for the respective demands matured at different times. The rights of the insurer under the abandonments were vested retroactively, as of the moment of the casualty which occasioned the loss and irrespective of payment of the loss.

Neither at the time of the loss, nor at the time notice of abandonment was given, had the carrier any right of set-off; its right to the benefit of the insurance did not mature until the proceeds of the insurance were received by the insured a long time thereafter. In this interval and before the insurance moneys had become due and payable by the terms of the policy, was not the carrier liable to the insurer for the loss? How, in that interval, could the stipulation avail the carrier? Did the receipt of the insurance money by the assured long after the right of action had become vested in the insurer, operate retroactively and release the cause of the action theretofore vested? Is the stipulation in terms broad enough to give the payment of the insurance money such effect? Does it require the assured on receipt of the money to procure a release of the cause of action against the carrier, which it was obliged to assign to obtain the insurance money?

If the stipulation is not in terms broad enough to ac-

complish this, will the court extend its terms in favor of a wrongdoer by an implication that will work a hardship on the insurer?

Look at the stipulation from another point of view. Suppose the assured had first sued the carrier, could he not have recovered indemnity for the loss caused by its negligent act? Once indemnified by the negligent carrier could the assured also obtain indemnity from the insurer? If he could not, how could he execute the stipulation; how could he give the carrier the benefit of that which he could not himself obtain?

To hold the carrier entitled, by virtue of the stipulation, to recover the insurance, is to hold that this policy is not what, *ex termini*, it appears; it is to hold that it is a contract, not between the owners and insurer, but between the insurer and the carrier; covering not the owner's interest, but the carrier's risk. Will the court do violence to the express terms of the policy and make a contract for the parties which they, themselves, have not made?

POINT VI.

TESTED BY THE FOREGOING PRINCIPLES THE AUTHORITIES RELIED ON IN SUPPORT OF THE DECREE BELOW ARE DISTINGUISHABLE FROM THE CASE AT BAR OR ARE NOT LAW.

In *Hall & Long vs. the R. R Co*, 13 Wall., 367, the doctrine of a marine underwriter's subrogation was applied to a land loss and it is said, "nor do the authorities make any distinction between the cases, though a carrier may, by stipulation with the owner of the goods, obtain the benefit of the insurance" (p. 371). A glance at the case shows that the question presented in the case at bar was not at all involved, and was in no wise material to the decision of

that case. The language above quoted was clearly *obiter*.

In *Mercantile Mutual Ins. Co. vs. Calebs*, 20 N. Y., 173, an agreement between the carrier and shipper provided that in consideration of reduced freights, the carrier would transport all the goods which the shipper would have for shipment, and that the shipper should take the risk of loss or damage from the danger of lake and river navigation, and in case of loss or damage, for which the carrier might be liable, it should have the benefit of any insurance by or for account of the shipper. The insurers upon abandonment, brought action alleging the loss to have been occasioned by the carelessness and negligence of the carrier and failed to recover. The case is distinguishable from the one at bar. (1) The agreement was expressly assented to by the shipper. (2) It was made in consideration of reduced freights. (3) It expressly related to insurance "for or on account of the shipper." (4) *Negligence as avered was not proven or found:* no liability in any event on the part of the carrier was established. (5) If the case be regarded as deciding that, if the carrier's liability had been established and negligence had been proven and found, the carrier could satisfy its liability therefor by the insurance, it might be supported upon New York authority, which holds that the carrier can stipulate against liability for negligence; but certainly it would be opposed to the doctrine finally determined by this court in Railroad Co. vs. Lockwood (17 Wall.) in which (p. 367) the New York doctrine did not receive the assent of this court. (6) The court in the *Calebs* case misconceives the legal effect of an abandonment. It assumes the insurer's rights thereunder can be controlled by an agreement to which the insurer is not a party and made between parties who are charged with notice of its rights.

Rintoul vs. N. Y. C. & H. R. R. Co., 17 Fed. R. 905 s. c. 20 Fed. R. 313., (also reported in 23 Am. L. Reg, p. 294,

where see the note.) This was an action at law by the shipper after having collected his insurance against the common carrier, for the loss of the goods.

The court, following the opinion of the district judge in the case at bar, credits the carrier, by virtue of the stipulation, with the net avails of the insurance and renders judgment against it for the value of the goods above the amount of the insurance.

Shipman, Circuit Judge, (17 Fed., R. 908) holds that the stipulation is not unreasonable, because "the owner is under no obligation to insure; * * * and the insurers can make a limited contract of insurance which does not cover losses through the carrier's negligence." The learned judge, here, we submit, misconceives the effect of a shipper's policy. It does not cover the carrier's negligence; it presupposes the ultimate and primary liability of the carrier for losses so occuring, and imports an agreement that such liability shall be enforced for the benefit of the shipper and insurer.

The learned judge also says: "It is not unfair to the owner * * * unless the obtaining of such indemnity is made compulsory upon him, because the owner 'can, equitably, receive but one satisfaction.'" But is not such a stipulation unfair to the owner if it discharges his insurance? Is it not unfair if it enhances the rate of premium for insurance?

In the language of Tindall, C. J., before quoted: "It would be monstrous to hold that the wrongdoer shall stand in even a better situation than the owner, by being permitted to take all the benefit of the policy without having paid the premium."

The learned circuit judge also says: "The contract is not necessarily unfair to the insurers * * * because the insurance company obtains its remedy not by virtue of

a contract of its own with the carrier, but through the owner's contract, and its right depends on, or is subject to the agreement made by the owners with the carrier, which he is at liberty to make to suit his own convenience, providing there is no fraudulent concealment from the insurers. They can, in view of this provision in bills of lading, modify the contract which they have heretofore customarily made with the assured, etc."

Here again, we submit, is error. The insurer of an owner's interest in goods in the possession of a carrier obtains his remedy over against the carrier in virtue of the policy; it is as much a part of the contract of insurance as if expressly stipulated. It cannot be taken away without the consent of the insurer. No agreement between the freighter and owner can affect it. (2 Phillips Ins. §1715.) It is not necessary for the insurers to modify the policies heretofore made. Express terms stipulating for subrogation against the carrier could not be more effective than the legal effect of an abandonment imputed in the policy. If, under the present form of policy, the assured cannot retain the *spes recuperandi* and recover, how can he stipulate it away without the insurer's consent? (*Atlantic Ins. vs. Storrow*, 1 Ed. Ch., 625.)

In *Carstairs vs. Mechanics & Traders Ins. Co.*, 18 Fed. R., 473, the action was on the policy, by the assured alleging a loss of goods by collision of railway cars, which was a peril insured against. The policy expressly stipulated for subrogation against the carrier in case of loss. The insurer set up in defence that the bill of lading contained the stipulation here in question, and that, thereby, its subrogation was defeated. Morris, circuit judge, following the reasoning of the district judge in the case at bar to its legitimate conclusion, held that the defence was good.

The effect of the decision is that there was no valid in-

surance for any one's benefit. Neither the shipper nor carrier were protected, and the underwriter carried no risk.

This situation, clearly, was not contemplated by any of the parties, and yet we submit it is the *reductio ad absurdum* of the position, that it is competent for the carrier to stipulate with the shippers for the benefit of their insurance, in such a manner as to satisfy its liability for negligence and thereby impair the underwriter's rights without the consent of the underwriter.

But assuming for purpose of argument, that such is the situation of the parties, it does not follow that the appellant is therefore barred of recovery.

The appellant claims not merely in right of abandonment, but as assignee in virtue of written assignments. (Sixth finding of fact, Record, p. 39, fol. 35.)

If, then, there was no binding insurance, appellee is entitled to no benefit of insurance, and the money paid by the appellant was not insurance, but the purchase price of the causes of action assigned, and as assignee the appellant is entitled to recover in this cause.

Foster vs. Van Reed, et al., 70 N. Y., 27, 28.

Recapitulating, we submit, that the court below erred in holding that the stipulation in question, defeated the abandonments, because:

The stipulation, thrust upon the shippers in a manner forbidden by the Illinois Statute, and never expressly assented to by them, and devised and intended as a limitation of the carrier's liability for negligent transportation, never had legal inception.

But if it had inception, it is not effectual to defeat the abandonments.

The contracts of insurance were absolute and independent contracts covering the shipper's, not the carrier's insurable interest, and made by the shippers, not for the benefit of, or pursuant to any obligation or duty to the carrier, but for their own benefit.

They were contracts founded upon the carrier's ultimate and primary liability for negligent transportation, which liability the carrier can not limit or restrict by stipulation with the shipper. Incident to these contracts was the right of abandonment having the effect of a legal assignment or vendition as mentioned.

The stipulation,—a *nude pact*—made without the privity or consent of the insurer, between parties charged with notice of its rights, is, at best, merely a declaration of trust, in favor of a volunteer, in respect of the proceeds of the insurance. Relating to the proceeds of insurance it could not become operative thereon until the proceeds had been paid to the assured; and prior to that time the rights of action here sought to be enforced had been completely and irrevocably vested in the insurer by the abandonments made by the same hands authorized by the stipulation to receive such proceeds.

In the absence of the trust fund and the trustee who thus received and holds it, a court of admiralty can not execute this voluntary trust, in favor of a wrongdoer and volunteer, so as to defeat a cause action assigned to realize the trust fund, and thus prejudice the innocent assignee.

Therefore, the court below should have rendered a decree in favor of the Insurance Company and against the Transportation Company for damages for the negligent loss of the grain. Respectfully submitted,

GEORGE D. VAN DYKE,
Of Counsel for the Appellant.

117-312

In the Supreme Court of the United States.

The Phœnix Insurance Company, Appellants,

vs.

The Erie and Western Transportation Company, Appellees.

October Term, 1883.
No. 739.

TO THE CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES:

The Phœnix Insurance Company, of Brooklyn, the appellants in this cause, pray the court to advance the hearing of this cause by the Supreme Court of the United States for the following reason:—

The case is reported in 10 Bissell, page 18, and referred to in Lawson on Carriers, page 382.

The question involved was the validity or reasonableness of a clause in a bill of lading, stipulating in case of liability of the carrier, the latter should have the benefit of the shipper's policies of insurance. It was held to be binding on the shipper, and as a consequence the Phœnix Insurance Company, insurers, who had paid the loss, were unable to recover what the insured could if he had sued, the damage sustained by the carrier's negligence. The effect of this clause is to reverse the right of subrogation of the shipper's insurers against the carrier. Hall *vs.* The Railroad, 13 Wallace, 367 - 367

The result of this decision is that insurers cannot pay such losses, but must leave the shipper to be indemnified by

suit against his carrier, and pay only after the carrier has by litigation discharged his liability for negligence.

Following the ruling in this case the Circuit Court of the United States of Maryland has in Carstairs *vs.* The Merchants' and Traders' Insurance Company of New York, 18 Federal Reporter, 473, decided that such a clause in a railroad bill of lading, accepted by the shipper, vitiated the shipper's policy as to such losses, because the right of subrogation was destroyed by the shipper so contracting with the carrier.

These two decisions leave the *insured* shipper unprotected in losses occasioned by the carrier's negligence.

Your petitioners further show that until the adjudication of this question, which will not be accepted by shippers or underwriters as settled until the final decision of the appeal in this case, the embarrassment of shippers and their underwriters must continue as to the effect of this clause commonly introduced into railway bills of lading, with its attendant effects on the security of such instruments, which are a basis of large amounts of inland and foreign bills of exchange, and adjustments of losses covered by insurances, by carriers, and shippers of the same merchandise, cannot be made, and the usual course, by which the shipper's insurers pay the loss, retaining all claims of the shipper against the carriers and his insurers, is abandoned.

Your petitioners, therefore, pray that in view of the importance of an early decision of this case to the important commercial interests other than those of these suitors in the final decision of this cause; that an order may be made to advance the hearing of the same in the Supreme Court of the United States, as the same cannot be reached in the ordinary course of the calling of the docket for a period of one year and upwards.

MORTON P. HENRY,
For Plaintiffs in Error.

FEBRUARY 11th, 1884.

The undersigned certify that the embarrassments arising from the effect of the subrogation clause in bills of lading referred to in the foregoing petition are as stated therein.

CHARLES PLATT,
President Ins. Co. of North America.
HIGGINS & CO.,
Attorneys for Subscribers at "United States Lloyds."
THE UNION MARINE INS. CO. LIMITED,
By Jones & Whitlock, Attorneys.
THEODORE FULLER,
Vice-President Boston Mutual Ins. Co.
ALFRED OGDEN,
Vice-President Orient Mutual Ins. Co.
FERDINAND MOTZ,
President Great Western Ins. Co.
H. & C. L. DUPNED,
Agents Boylston Mutual Ins. Co.
BRITISH & FOREIGN MARINE INS. CO. LIMITED,
(*New York Branch*) *L. A. Wright, Underwriter, Liverpool.*
J. B. BRANCH,
Secretary Providence Washington Ins. Co.
JAMES LAWSON,
Attorney Universal Marine Ins. Co. Limited.
THAMES & MERSEY MARINE INS. CO. LIMITED,
A. J. MacDonald, Agt., per A. MacDonald, Attorney.
HUGO WENZEL,
Genl. Agt. Union Ins. Co. of Philadelphia.
CUTTIN & SATTERTHWAITE,
Att'ys Ins. Co. of North America and China Mutual Ins. Co., Ct.
CHARLES DENNIS,
Vice-Pres. Atlantic Mutual Ins. Co.

SOCIAL MANUFACTURING CO.,
By Henry Lippit, Treasurer.
R. & F. DEMING & CO.
T. B. BLEECKER, JR.,
President New York Mutual Ins. Co.
JOHN P. PAULISON,
President of Sun Mutual Ins. Co.
H. J. COMES,
President Commercial Mutual Ins. Co.
THOMAS C. HAND,
President Delaware Mutual S. Ins. Co.
HENRY D. SHERRERD,
President of The Insurance Company of the State of Pennsylvania.
C. HIESKELL,
President of Union Insurance Company, Philadelphia.
D. F. FULLER,
President Boston Marine Ins. Co.
WILLIAM PERKINS,
President China Mutual Ins. Co. of Boston.
JOHN N. DANE,
President India Mutual Ins. Co., Boston.
MANUFACTURERS' FIRE & MARINE INS. CO., BOSTON.
By Samuel Appleton, President.
BOYLSTON MUTUAL INS. CO. OF BOSTON,
By T. W. Balch, President.
AMERICAN INS. CO.,
By Francis Peabody, President.
WASHINGTON FIRE AND MARINE INS. CO.,
By Isaac Sweetser, President.
SHOE AND LEATHER INS. CO.,
By C. A. Fuller, Secretary.
MERCANTILE FIRE AND MARINE INS. CO.,
By G. W. R. Rogers, President.

Views of Shippers as to Effect of Clause in Bill of Lading.

Boston, January 10th, 1884.

William C. Annan, Esq.,

Dear Sir:—The undersigned beg to call your attention to the clause now common to most bills of lading issued by many transportation companies, providing "that in case of loss the carrier shall have the benefit of all insurance effected by the shipper or consignee," and that it has been recently decided that this clause prevents a recovery from the carrier by the insurer in the name of the shipper or consignee, although the goods were destroyed by the carrier's negligence. In consequence of this, the insurance companies now refuse to pay losses in such cases, and have been sustained in this course by the courts. In view of the disastrous effect which this form of bill of lading is having upon business, we would request you to take such steps on our behalf as you may think best to have the clause in question withdrawn from the bills of lading in use by the various railroads and transportation companies.

Signed:—

George C. Richardson, Smith & Co.
John L. Bruner & Co.
Lawrence & Co.
J. Langdon & Co.
Wheelwright, Anderson & Co.
George Artemue, treasurer Massachusetts Cotton Mills.
Augustus Lowell, treasurer Booth Cotton Mills.
J. C. Birdseye, treasurer Tremont and Suffolk Mills.
Lawrence Manufacturing Co., by L. M. Sargent, treasurer.
Whittenton Manufacturing Co., by Charles L. Lovering, Jr.

Pacific Mills, by Henry Saltonstall, treasurer.
Chicopee Manufacturing Co., by A. T. Perkins, treasurer.
Harrington Manufacturing Co., by James A. Dupee, treasurer.
Appleton Co., by James A. Dupee, treasurer.
Atlantic Cotton Mills, by William Gray, Jr., treasurer.
Indian Orchard Mills, by William Gray, Jr., treasurer.
Ocean Mills, by William Gray, Jr., treasurer.
C. H. Dalton, treasurer Menimuch Manufacturing Co.
Nevins & Co. Methuen Co., David Nevins, treasurer.
Harding, Colby & Co.
Joy, Lincoln & Motley.
Faulkner, Page & Co.
Hill Manufacturing Co., by F. L. Richardson, treasurer.
Great Falls Manufacturing Co., by A. P. Rockwell, treasurer.
Samuel N. Payson, for Derry Mills.
New York Manufacturing Co., per W. G. Saltonstall, treasurer.
Minot, Hooper & Co.
Pemberton Co., by Henry S. Shaw, treasurer.
J. P. Bradlee.
Continental Mills, by William B. Wood, treasurer.
Brown, Wood & Kingman.
Case, Leland & Co.
Converse, Stanton & Davis.
Saratoga Victory Manufacturing Co., Louis Robinson, treasurer.
Peabody Mills, Louis Robinson, treasurer.
Washington Mills, Henry F. Coe, treasurer.
F. M. Weldwen.
Chince Manufacturing Co.
Webster Mill.
Pembroke Mill.

Newton Mill.
Lake George Manufacturing Co.
Bules Manufacturing Co., by J. Edward, president.
Dwight Manufacturing Co., by J. Howard Nichols, treasurer.
Lyman Mills, S. L. Berch, treasurer.
Everett Mills, by E. H. Sampson, treasurer.
Bliss, Foley & Co.
H. B. Claflin & Co.
Garnet & Co.
Charles C. Budsey, treasurer Newburg Manufacturing Co.
Jacob Wendell & Co.
Coffin, Altemus & Co.
Storbridge, Borden & Co.
David L. Brown & Co.
Anchoria Printing Co., J. S. Moore, treasurer.
The Gloucester Manufacturing Co., S. Chew, treasurer.
Gloucester Gingham Mills, S. Chew, treasurer.
Vanuxem, Wheaton & Co.
H. P. & W. P. Smith.
Megs, Dale & Co.
Rice, Kindall & Co.
Nashua, Manuel & Co.
Jackson Co., by Frederick Amory, treasurer.
Limiton Mills, by Moses W. Richardson, treasurer.
Hollingsworth & Whitney Co., Charles A. Doan, president.
Boston Manufacturing Co., by Edmund Dwight, treasurer.
Stark Mills, by Edmund Dwight, treasurer.
Atlantic Mills, Owen Bros., agents.
Manville Co., William A. Tucker, treasurer.
Williamsville Manufacturing Co., Samuel Frastre, treasurer.
Lockwood Co., J. W. Danielson, treasurer.
Quinebaug Co., J. W. Danielson, treasurer.

R. M. Lavried & Co.
A. Mudale Co., William Dely, treasurer, George W. Gould, secretary.
Cap, Sturges & Co., agents Buckley Co.
Fitchville Manufacturing Co.
Weybosset Mills, R. C. Taft, president.
Taft, Weeden & Co.
G. Nightingal & Co.
Powhatan Mills, G. A. Nightingale, treasurer.
Nightingale Mills, G. A. Nightingale, treasurer.
Mase Mills, G. A. Nightingale, treasurer.
J. P. Campbell & Co.
Merchants' Manufacturing Co., by S. B. Chase, treasurer.
Granite Mills, by M. Shire, treasurer.
Pocasset Manufacturing Co., by B. O. Dawl, treasurer.
Temuset Mills, by F. H. Twelly, treasurer.
Chase Mills, Joseph Baker, treasurer.
Patamskee Mills, by M. U. Adams, treasurer.
Amshuet Mill Co., by J. F. Knowles, treasurer.
Wamsutta Mills, by A. G. Price.
Oneko Mills, Samuel Snow, President.
Samuel Snow & Son.
Guinnell Manufacturing Co., by Otis N. Price, treasurer.
Mechanics' Mills, H. N. Durfell, treasurer.
Crescent Mills, by A. S. Covel, treasurer.
S. Safford Mills, by A. E. Bosworth, treasurer.
Border City Manufacturing Co., by E. L. Anthony, treasurer.
Flint Mills, by William S. Potter, treasurer.
Wamsutta Mills, Jane Eddy's Sons.
Fall River Manufacturing Co., by H. B. Durfee, treasurer.
Barnard Manufacturing Co., by Nathaniel B. Borden, treasurer.
Richard Borden Manufacturing Co., Richard Borden, treasurer.

Troy C. & W. Manufacturing Co., by R. B. Borden, treasurer.
King Philip's Mills, by E. C. Killrum, treasurer.
Montump Mills, per Isaac Burton, treasurer.
Osborn Mills.
Bonner Mills.
George A. Chace & Co.
Remington & Davol.
Slade Mills.
Barnaby Manufacturing Co., by S. B. Ailily, president.
George H. Hawes.
Davol Mills, Charles M. Slade, treasurer.
Nanaguns H. Mills, James Waring, treasurer.
Globe Yarn Mills, S. B. Sanford, treasurer.
Conamicut Mills, C. E. Ludwy, treasurer.
S. Healy & Co.
Shoe Mills, George A. Chace & Co.
Tuttle, Miller & Co.
B. F. Randall.
Hooper & Buffington.
Covel & Osborn.
E. H. B. Brown & Co.
Borden & Morville.
American Linen Co., P. L. Borden, treasurer.
Boston Rubber Shoe Co., by E. S. Converse, treasurer.
John B. Alley & Co.
Houghton, Coolige & Co.
Pam Rubber Shoe Co.
E. & A. Batchett & Co.
Colbrera, Fuller & Co.
Potter, White & Bailey.
N. W. Rice & Co.
J. F. Dane, Grinnell & Co.
N. E. Proctor.
Henry Poor & Son.
Androscoggin Mills, by T. W. Walker, president.
Victoria Mills, Walker Brothers, agents.

Demas Bleachery, Walker Brothers, agents.
Fishdale Mills, J. C. Fish, treasurer.
H. C. Thatcher & Co.
Farnnus Cotton Mills, by H. C. Thatcher & Co.
Langdon Manufacturing Co., by C. W. Amory, treasurer.
Amory Manufacturing Co., by C. W. Amory, treasurer.
Almy & Co.
Elberton L. Doo & Co.
A. D. Brown & Son.
Van Volkenburg & Leavitt.
A. D. Jailliard & Co.
Lewis, Brothers & Co.
William Simpson, Sons & Co.
William Simpson & Sons.
The Eddystone Manufacturing Co., limited, William Simpson & Sons, treasurers.
George H. McFadden & Brother.
Randolph & Jenks.
The A. Campbell Manufacturing Co., William H. Jenks, vice-president.
Edw. H. Coates & Co.
Middleton & Leary.
Lawrence, Tayler & Co.
Wendell, Fay & Co.
William Turnbull & Co.
Woodward, & Dosdirm Co.
P. S. March & Son.
Munan, Duann & Co.
Fatman & Co.
Lehm Air Brothers.
Pp. Ralli Brothers, Th. P. Ralli.
George Copeland & Co.
E. R. Robertson & Co.
John B. Leech.
Robert Tannahill & Co.
Hopkins, Dwight & Co.
Fletcher & Hotze.

Rountree & Co.
Farrar & Jones.
William Canius & Son.
Hilton, Weston & Co.
Denny, Rice & Co.
Lueet Manning.
Chamberlin Brothers & Co.
Nichol, Dapu & Co.
Hallswell & Toburn.
Brown, Stelle & Clarke.
Williams & Colburn.
Plymouth Woolen Co.
Gray, During, Goull & Co.
Morses, Denny & Co.
Low, Hanman & Co.
W. L. Strong & Co.
Kibbe, Chaffee, Shooet & Co.
James F. White & Co.
H. J. Goodwin & Co.
Parker, Wilder & Co.
Deenn, Millikin & Co.
S. P. E. Herbs.
Samuel Slater & Sons, by J. C. Peck.
Stokes, Thompson & Co.
Chapman & Martin.
Stephen M. Wild & Co.
B. B. & R. Knight.
Hebron Manufacturing Co.
Manlarge & Co.
White, Roch & Co.
Pontiac Manufacturing Co.
Reatville Manufacturing Co.
Clinton Manufacturing Co.
Dodgeville Co.
Grant Mills.
Fiskville Mills.
Natin Manufacturing Co., Goddard Brothers, agents.
Social Manufacturing Co., B. P. Lippitt, treasurer.

B. P. Lippitt & Co.
Lippitt, Woolar & Co., C. H. Merriman, treasurer.
Wauregan Mills, Edw. P. Taft, treasurer.
Ponewah Mills, Edw. P. Taft, treasurer.
John H. Mason & Son.
Ponaganset Co.
A. Steeve & Son.
Valley Mill Company, E. H. Robinson, treasurer.
R. H. Deming & Co.
C. R. Rhodes.
S. H. Greene & Sons.
T. A. Randall.
Allen's Print Works, John B. Kelly, treasurer.
Bemon Manufacturing Co., J. B. Kelly, treasurer.
Grovenor, Dale & Co., William Grovenor, Jr., treasurer.

117-312

Supreme Court of the United States.

THE PHŒNIX INSURANCE COMPANY OF BROOKLYN,
Appellant,

vs.

THE ERIE AND WESTERN TRANSPORTATION COMPANY.

Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.

BRIEF

ON THE PART OF THE APPELLEE.

GEORGE B. HIBBARD, for the Appellee,
BUFFALO, N. Y.

THE COURIER COMPANY, Printers, Buffalo, N. Y.

SUPREME COURT OF THE UNITED STATES.

THE PHŒNIX INSURANCE COMPANY OF BROOKLYN,
Appellant,

vs.

THE ERIE AND WESTERN TRANSPORTATION COMPANY.

BRIEF ON THE PART OF THE ERIE AND WESTERN TRANSPORTATION COMPANY, APPELLEE.

GEORGE B. HIBBARD,
For the Appellee, Buffalo, N. Y.

The leading facts in the case, as they appear from the transcript of the record, are claimed on the part of the appellee, to be as follows:

1. On the 24th day of July, 1874, A. M. Wright & Co., at Chicago, caused to be shipped on board the propeller Merchant, then owned by and used in the business of the appellee, 16,325.34 bushels of corn of the value, as stated in the libel in the case (page 2 of the transcript of the record), of about $11,000, and which, in the finding of facts, are stated to have been of the value of $8,000 (p. 33); and on the same day, Elmendorf & Co., at Chicago, so caused to be shipped 800 bushels of corn of the value of $600; and on the same day Gilbert Wolcott & Co., at Chicago, so caused to be shipped 370.30 bushels of corn and 689.02 bushels of oats, all of the value of $800. The shippers respectively were the owners respectively of the grain by them respectively so shipped (pp. 33, 34).

2. As to each of these shipments, the libel contains an allegation of matter not specified as forming part, and not appearing to have formed part of what the appellee claims were mere preliminary verbal understandings or agreements respecting the carriage or delivery of the grain—an allegation with respect to each shipment as to loss or damage by fire, collision, the dangers of navigation, etc. (pp. 2, 3, 4), which it is claimed on the part of the appellee (Post, Point First, XXII), shows that the action was brought on the bills of lading hereinafter mentioned, and not upon what it is claimed on the part of the appellee were mere preliminary verbal agreements by which the rates of freight for the contemplated carriage of the grain were agreed upon by the parties respectively, with reference to and to be specified in bills of lading, to be issued as to the shipments respectively. It *was tacitly understood* (as is expressly stated in the finding of facts, p. 40) *that bills of lading would subsequently issue to the shippers for the shipments.* (Post, Point First, IV, V, VI.)

3. The finding of facts states that: "On the said 24th "day of July, 1874, said shippers severally made verbal "agreements with respondent for the transportation of "said grain, whereby respondent, in consideration of certain "stipulated freight, agreed to transport said several parcels "of grain from Chicago to Erie, *via* the lakes, and thence "to forward them to their destinations as aforesaid. It was "tacitly understood that bills of lading would subsequently "issue to said shippers for said shipments, but nothing "whatever was said respecting the terms and conditions "thereof, and especially nothing was said touching the "terms and conditions" of the insurance clause hereinafter set forth (Post, 7).

4. After the property was shipped on the propeller and she had departed on her voyage, the appellee delivered to the shippers respectively, contracts—bills of lading—applicable respectively to the respective shipments, the body of each of which appears from exhibits annexed to the answer (pp. 40, 26, 27, 28), which bills of lading *were received by the shippers without protest or objection* (p. 40).

The bills of lading were signed in behalf of the shippers Elmendorf & Co. and Gilbert Wolcott & Co., but the one

delivered to A. M. Wright & Co. was not signed by them or in their behalf (pp. 40, 41). It does not appear that A. M. Wright & Co. refused to sign the bill of lading delivered to them, and it is claimed on the part of the appellee that, beyond question, the shippers respectively received the bills of lading respectively, as those which it was understood should be issued, and that as they so received them without protest or objection (p. 41), and as they respectively knew, or had every opportunity from former transactions, to know the terms of the bills, they were the contracts under which the respective shipments must be here regarded as made. (Post, Point First, IV, V, VI, VIII, XVII, XIX.)

5. It appears also from the finding that the bills of lading so delivered were received "without *specially* reading the terms and conditions" contained therein, and the attention of the shippers was not directed thereto, nor was anything said respecting them, and no reduction was made from the *rate of freight stipulated in the verbal agreement* in consequence of said terms and conditions, or other consideration paid therefor, but the shippers *knew* the terms of said bills of lading and had *often* before shipped goods by the line which the appellee ran, and in which line the Merchant ran (p. 33), under similar bills of lading, or had *every* opportunity of knowing the contents of said bills of lading by *repeatedly* shipping goods under similar contracts (p. 41). Of course they could not have had *every* opportunity to know the contents of these bills of lading from other bills, unless the others were the same, except as to the particulars of each shipment, as these. There is nothing in the finding to show that they did not know the contents of these bills of lading. (Post, Point First, IV, V, VI, XV, XVII, XIX.)

6. The loading of the propeller was completed in the evening of July 24, 1874, and about midnight she departed on her voyage. About ten o'clock the next morning, the propeller, in a dense fog, was stranded on the western shore of Lake Michigan, about ten miles south of Milwaukee, and the finding of facts states that the propeller was so stranded "through the negligence of those managing the propeller" (p. 39).

7. Each of the bills of lading so delivered to and received by the shippers, contains a provision (p. 28), as follows:

"It is further stipulated and agreed that in case of any "loss, detriment or damage done to or sustained by any of "the property herein receipted for during such transpor- "tation, whereby any legal liability or responsibility shall or "may be incurred, that company alone shall be held answer- "able therefor in whose actual custody the same may be at "the time of the happening of such loss, detriment or dam- "age, and the carrier so liable shall have the full benefit of "any insurance that may have been effected upon or on "account of said goods."

8. The appellant was a body corporate, organized under the laws of the State of New York, and empowered to transact a general lake and insurance business (p. 33). The appellant issued to the shippers respectively certain certificates set forth in the transcript of the record (pp. 34, 35) referring to a policy of insurance also so set forth (pp. 35–38). These shipments were duly approved and indorsed upon the policy (p. 39). It will be observed that the policy provides for the insurance of Charles E. Chase "on account of whom it may concern," on property "lost or not lost" (p. 35), and that the certificates refer to the shippers respectively as "insured under and subject to the conditions" of the policy, which in the certificates is designated as an "open policy" (p. 34). The finding of facts states that the appellant, at the request and expense of the shippers (but this it is claimed, on the part of the appellee, only refers to the parts of the transactions between the shippers respectively and the appellant, and not to the transactions in this respect as between the shippers, respectively, and the carrier—pp. 40, 41; Post, Point First, XV), insured the shippers respectively against loss, etc. (p. 34), and, of course, the contracts of insurance appear from the certificates, the policy and the facts (pp. 34–38, 40, 41, 28), and are not changed by any words in the finding descriptive of them.

9. A. M. Wright & Co. executed to the appellant an instrument (p. 39), of which the following is a copy:

"CHICAGO, August 19, 1874.

"For and in consideration of the sum of eight thousand "and no hundredths dollars, the receipt whereof is hereby

"acknowledged, we do by these presents assign, transfer, "cede and abandon to the Phœnix Insurance Company all "our right, title and interest in and to the property herein- "after specified, and to all that can or may in any way be "made, saved or realized from the damage or loss reported "to have occurred, by reason of which a claim of payment "has been made by us, with full power to take and use all "lawful ways and means (at the risk and expense of the "Phœnix Ins. Co.) to make, save and realize the said prop- "erty, to wit, 16,325.34 bushels of corn, as per bill of lading "and invoice, shipped on board the propeller Merchant, "bound from Chicago for Erie, and covered by insurance "with the Phœnix Ins. Co., by open policy No. 2263, cer- "tificate No. 627, under date of July 24th, 1874.

"To the extent of the interest of the said Phœnix Ins. "Co. in said property.

"A. M. WRIGHT & Co."

10. Elmendorf & Co. and Gilbert Wolcott & Co. (pp. 39, 40) respectively, executed to the appellant instruments respectively as to their respective shipments, similar to that executed by A. M. Wright & Co., except as to date, amounts, description of property, etc., and except that the instruments executed by Elmendorf & Co. and Gilbert Wolcott & Co., respectively, did not contain the last sentence, "To "the extent of the interest of the said Phœnix Ins. Co. "in said property," contained in the instrument executed by A. M. Wright & Co.

11. Each of these instruments, it will be especially observed, contains the words "do *by these presents* assign, "transfer, cede and abandon to the Phœnix Insurance Com- "pany all our *right, title and interest* in and to the prop- "erty hereinafter specified, and to all that can or may in any "way be made, saved or realized from the damage or loss, "reported to have occurred, by reason of which a claim of "payment has been made by us, with full power to take and "use all lawful ways and means (at the risk and expense of "the Phœnix Ins. Co.) to make, save and realize the said "property," * * * *as per bill of lading* and invoice, "*shipped* on board the propeller Merchant * * * *covered* "*by insurance* with the Phœnix Ins. Co., by open policy "No. 2263," specifying the certificate in each case, and specifying the same to be "under date of July 24th, 1874."

POINT FIRST.

The clause in the bills of lading relating to insurance formed part of the contracts of affreightment in the case, and the appellee is entitled to the benefit thereof.

I. This is an action *in personam*, in admiralty, brought in an admiralty court, which, as such, is a court beneath the law of nations, and which, in such cases, administers the law-merchant unaffected by local decisions, save, perhaps, as in analogy or in their intrinsic merit, they may serve to illustrate a point or show the soundness or fallacy of a position. The statute of the United States, with respect to the "laws of the several states, etc.," has no application to them. Nor does a state statute, in such courts, affect such questions as are here presented.

Constitution of the U. S., Art. III, sec. 2.
R. S. of the U. S., sec. 563, Eighth.
1 Statutes at Large, 76, ch. 20, sec. 9.
R. S. of the U. S., sec. 721.
1 Statutes at Large, 92, ch. 20, sec. 34.
The Huntress, Davies, Note, p. 100.
The Neptune, 3 Haggard, 129.
The Eagle, 8 Wallace, 15.
The Lottawanna, 21 Wallace, 558.
The Belfast, 7 Wallace, 624.
The Belgenland, 114 U. S. 355.
Insurance Company vs. Dunham, 11 Wallace, 1.
1 Parsons on Ship. and Ad., 3-24.
Post, Point First, XVIII.

II. It seems plain that when these bills of lading were made, delivered and received as they were (Post, Point First, IV, V, VI), and this clause was in each of them, that the clause must form part of each contract of affreightment. It is understood, however, that it is claimed on the part of the appellant that it does not, and, at least, that this is mainly so claimed because of certain decisions made in the State of Illinois, and a statute of that state.

III. To enable the matter to be fully understood, it is necessary to consider how the contracts of affreightment

were really made and what the instruments delivered and received as bills of lading really were.

IV. The verbal agreements referred to in the finding of facts were such preliminary agreements as are made by merchants shipping property of this kind, shipped as this was, and at Chicago, and made as preceding bills of lading to be made in such cases and to enable such bills to be made out. This is apparent from the preliminary agreements themselves. In them—

1. No owner or consignor was named.

2. No consignee was named.

3. No vessel was named upon which the property was to be carried, although the appellee (p. 33,) ran a line of propellers.

4. "It was tacitly understood that bills of lading would "subsequently issue to said shippers for said shipments" (p. 40).

5. These alone must show that the "verbal agreements" were merely to precede bills of lading *and to enable bills of lading to be made out* and were not the contracts of affreightment under which the property was to be carried—that they were such preliminary parol negotiations as this Court will take judicial notice (Post, Point VII) usually precede the making of bills of lading.

But this will even more fully appear from other considerations.

V. "It was tacitly understood that bills of lading would "subsequently issue to said shippers for said shipments, but "nothing whatever was said respecting the terms and con-"ditions thereof, and *especially nothing* was said touching" the insurance clause (p. 40).

Why should there have been anything said? Bills of lading were to issue. The carrier ran a line of propellers (p. 33). The shippers, as appears from the finding, "*had often before shipped goods by said line under similar contracts*" and "*knew* the terms of" the bills of lading which they received pursuant to the understanding, "*without protest or objection*," "or had *every* opportunity of knowing the

contents of said bills of lading by *repeatedly shipping goods under similar contracts*," and which, of course, must have been the same with reference to the other shipments as these as to these, otherwise, although the shipments were "often" and "repeatedly" made, they would not have afforded the shippers "*every* opportunity" of knowing the contents of these.

The finding, after stating that the contracts—the bills of lading, of course (Post, Point First, VIII)—were received by the shippers "*without protest or objection*," etc., continues as follows:

"Said contracts so delivered and signed were received "without specially reading the terms and conditions con- "tained in those particular contracts, and the attention of "said shippers was not directed thereto, nor was anything "said respecting them, * * * but the shippers knew "the terms of said contracts or bills of lading, and had "often before shipped goods by said line under similar con- "tracts, or had every opportunity of knowing the contents "of said bills of lading by repeatedly shipping goods under "similar contracts" (p. 40, 41).

Certainly all must know what these transactions were—must know this as these shippers knew what they were, or must be held to have known what this Court will take judicial notice of (Post, Point First, VII), that these were ordinary cases of shipments by a line, for which, after the rate of freight was agreed upon in the usual preliminary negotiations, and so agreed upon with reference to the bills of lading of the line (Post, Point First, XV), and which had been "*often*" and "*repeatedly*" used in similar transactions, such bills should be issued. Why should not the shippers receive the bills of lading as they did, "without protest or objection," and "without *specially* reading the terms and conditions contained in those particular contracts, or why should the "attention of the shippers" be "directed" thereto or anything said about them? Is it not apparent that the business was done in the ordinary way, and that the shippers knew or were so bound to know, when they had so had "*every* opportunity" to know, the contents of the bills of lading, which the carrier had the right to assume were known to the shippers? Why, under any rule claimed to exist, even in Illinois, "direct" attention to what the shippers "*knew*" or had "*every* opportunity" to know before? And

there is nothing in the case to show that the shippers did not know the contents of the bills of lading (Post, Point First, XVII).

VI. These, then, were the circumstances under which these bills of lading were issued and received, and under these circumstances, and without reference to anything else, can there be any doubt that they constituted the contracts of affreightment? Can it be supposed that this property was really carried under the extreme and severe liabilities of a common carrier, unqualified by any provision of a bill of lading lessening such liability? And yet such, it is understood, will be substantially the claim on the part of the appellant in this respect.

VII. Courts will take judicial notice of how such business is done; the important and substantially public business of common carriers, and warehousemen, and of bankers, merchants, etc., in the great commercial centres of the country; will take judicial notice, for instance, of the manner of making preliminary agreements as to rates of freight, made "on change;" of the giving of bills of lading for grain to be carried from Chicago by such carriers as this appellee; of advances made by bankers thereupon; of the position of consignees receiving property thereunder; of insurers taking rights with respect thereto; of rights to arise and be enforced in many states or countries; and so taking notice, will, it is most confidently believed, conclude that when such transactions are negotiated, neither carrier or shipper will be expected in each case, and upon the instant, to do the work of the counting-house, and then and there make out a bill of lading; and no matter with what succintness of language the matters are set forth in the finding, in such cases as this, will conclude that this business was done as such business is done; that preliminary negotiations as to the rates of freight were concluded, and bills of lading were given and received as it was understood they should be, and were received "without protest or objection," and in the usual course of business. The subject is one of which courts will take judicial notice.

Brown, et al., vs. Piper, 91 U. S. 37, 42.
Terhune vs. Phillips, 99 U. S. 592, 593.
The M. N. Bank of W. vs. Hall, 83 N. Y. 338, 345.
Slater, et al., vs. Jewett, 85 N. Y. 61, 68.
Agawam Bank vs. Stover, 18 N. Y. 502, 512.

VIII. Plain as it would seem to be, yet it may be advisable to consider what these instruments were. They were not receipts, they were bills of lading. Each is called a bill of lading in the instrument itself (pp. 27, 28), and in the instruments given by the shippers to the insurer (pp. 39, 40) and in the finding (p. 41). But, above all, their contents show what they were; that they were bills of lading, instruments of a kind among the oldest, if not the very oldest known to the law-merchant; instruments with consignors, consignees, termini, rates of freight, vessel, all stated, and different from a receipt; instruments of a kind not local to one community or state, but often running, so to speak, through more than one state, often from one country to another, to be passed upon by courts of different states and countries; instruments, beneath which various parties may have rights and obligations in the course of business of which courts will take judicial notice (Ante, Point First, VII); instruments of the kind in or as to which consignors, consignees, advancers, transferees, carriers, insurers, may be interested. They were bills of lading, and not mere receipts, within strict definition of what a bill of lading is.

The Thames, 14 Wallace, 98.
The Delaware, 14 Wallace, 579, 600.
Railroad Company vs. Androscoggin Mills, 22 Wallace, 594.
Hart vs. Pennsylvania Railroad Co., 112 U.S. 331.
McMillan, et al., vs. M. S. & N. I. R. R. Co. 16 Mich. 79, 114.
Lawson on Contracts of Carriers, sec. 112.

And yet it is understood that it will be claimed on the part of the appellant that beneath some rule claimed to prevail in the State of Illinois, or beneath a statute of that state, these bills of lading, given and received as has been stated, are merely things of which the shippers might reject such parts as they chose, except so much thereof as designate the few matters stated in the preliminary "verbal agreements," for the reason that it does not affirmatively appear that the attention of the shippers was called to the provisions of the bills, and that they gave express assent thereto. Such is understood to be the claim on the part of the appellant.

Were the doctrine, which it is supposed will be contended for by the appellant, sought to be applied to cases arising as to the effect of notices given by carriers, were it even

sought to be applied to cases where *receipts* only have been given, or even where limitations of liability are attempted by the quick dexterity of carriers of passengers, to be thrust upon travelers through the instrumentality of tickets, that would be one thing. But to apply it to a bill of lading, as has been said, one of the oldest instruments known to the law-merchant, one requiring no more haste in its making than any other commercial contract; one of such diverse aspects, and out of which such various consequences can arise—to claim that a shipper shall not be bound by any parts of such an instrument, issued and received as these were (Ante, Point First, IV, V, VI), unless it shall appear that the attention of the shipper was directly called to such parts, and he expressly assented to them, is altogether another.

Suppose the law applicable to such cases were as it is supposed it will be claimed it is on the part of the appellant, what would be some of the consequences? In case of actual or equitable transfer of such an instrument what would a banker, advancing upon its faith, for instance, take? Rights, as the bill reads, or rights dependent on such parts only as it affirmatively appears a shipper read and expressly assented to? Consignees receive property under bills of lading and generally subject to their provisions, and often with rights and liabilities fixed thereby (*Edwards on Bailments, sections 592, 593, 643*). What are these provisions? Such as under the usual conflict of verbal testimony in such cases a jury may conclude a shipper actually read and expressly assented to, or such as the consignee read when he accepted the property under the bill of lading? And what are such bills to be determined to be as to parties taking rights with respect thereto by subrogation? And how many different contracts may there be with respect to one bill of lading, dependent on questions as to who did or did not read its provisions or some of them? Is the law-merchant (to say nothing as to the rules forbidding change of written contracts by parol evidence) to be changed by the establishment of a principle which has never yet found place among the principles of general commercial jurisprudence? Is a bill of lading to lose its old significance and really become nothing in itself, in most important parts, but a memorandum as to which carriers, bankers, advancers, insurers and consignees can query and write and telegraph to find out, and often to doubt, whether express assent has been given

to many of its most important parts? Is the shipper in such a case to have rights different from those of any other party interested as to the bill? Is the shipper, for instance, to have one thing to settle with his consignee on and another to sue upon? Is a bill of lading in such a case to be a thing of such various aspects as to different parties interested with respect to it, of such shifting aspects as to become a sort of paper puzzle, a piece of legal juggler's work, now one thing and now another? Or is it that stable and well-recognized instrument known to the commercial world and the law-merchant for centuries, to be of one significance to all parties and, as it should be, of one significance beneath all systems of jurisprudence and governed like other instruments by settled rules of law?

Nor are these idle questions. They arise out of the very nature of the transactions now under consideration. It is most confidently believed that the doctrine which it is understood will be contended for on the part of the appellant in this respect will not be held by this Court to apply to bills of lading, and especially not to inter-state bills of lading, so to speak, as these were. It is most confidently believed that such commercial business cannot be done beneath such doctrine.

Of course, if there are provisions in a bill of lading illegal or against public policy, that may be supposed to be known. Such points will be hereinafter considered (Post, Point Second, XVI). But that, of course, is not the matter now under consideration. The point now is that such doctrine as it is supposed it will be claimed should apply here—the doctrine that no provision of a bill of lading shall qualify or affect the liability of a common carrier unless it is expressly shown that the attention of the shipper was directed to it and that he expressly assented to it—is unsound and has no application to this case.

IX. It is understood that the contention on the part of the appellant in this respect is not that upon questions of general commercial law the decisions of the court of last resort of Illinois should prevail in this Court, but that the appellee is a corporation of another state, and that therefore comity requires that it should be governed by the law of Illinois in this instance, as pronounced by its courts, and, also, as it is claimed on the part of the appellant, that the decisions of the Federal Courts, or of some of them, are not in conflict

with the Illinois decisions in this respect, and that therefore the Illinois decisions, or the statute of Illinois, which will he hereinafter considered, should control the case. It is confidently claimed that no part of this contention can be sustained.

1. The doctrine of comity does not apply to such a case. That doctrine, in this respect, only applies to provisions necessarily relating to the powers of corporations foreign to the state. It is not the law, that, because the courts have made decisions as to matters relating to its citizens, to natural persons, and to domestic and foreign corporations, that although a court will hold the decisions not good law as to all except foreign corporations, it will hold them good as to them. There was no legislative intent—no judicial intent—to establish a difference in that respect—to limit the comity under which foreign corporations did such business in Illinois. This was not a question of state policy. It would be a strange doctrine, indeed, that should hold that the doctrine contended for on the part of the appellant, would apply to a foreign corporation, but to no other person, natural or artificial. And these same considerations apply as well to the Illinois statute, which will be referred to. (Post, Point First, XVIII.) Decisions and statute are alike general. If they are not good or effectual as to all parties they are not as to the appellee. Nor can the courts of that state establish something to be law beyond the power of its legislature to enact. (Post, Point First, XVIII.)

It will not be regarded as against the policy of a state that a corporation foreign thereto should be restricted in its powers, nor will it be so restricted, unless it be by express affirmative enactment with respect to such corporations. Such corporations as to such questions as are here presented, in the absence of such special legislation, stand, in these respects, as do other persons, natural or artificial, and are entitled to the same protection.

Cowell vs. Springs Co., 100 U. S. 55, 59.
Gloucester Ferry Co. vs. Pennsylvania, 114 U. S. 196, 204.
Post, Point First, XVIII.

2. It is hardly worth while to take the space which would be necessary were the decisions of the courts of Illinois, in this respect, to be properly analyzed and considered, from the case of *The Adams Express Co. vs. Haynes,*

42 Ill. 89, arising as to a receipt, and to run through them all, influenced or controlled. as they are, by the leading idea there perhaps started (and perhaps proper as to that case) to the latest case on the subject. It is enough to say, and it is said without disrespect, that in not one of the cases does any opinion consider the matter as it really stands for consideration upon a bill of lading, much less upon an interstate bill of lading, considered in all its aspects--that none of them, it is believed, regard the matter here considered save as it might be regarded were there no such transactions, except such as might arise where, for instance, a party, not a business man, sent a bundle of furniture from Springfield to Chicago, and took a railroad receipt therefor—that even in the opinion in the case of *Erie and W. T. Co. vs. Dater, et al., 91 Ill. 195*, it is in substance merely announced that the law is the same as to a commercial bill of lading—as to an interstate bill of lading—as to a receipt and the question of estoppel (Post, Point First, XVII), although succinctly stated, is not fully considered as such. And even as to these cases in Illinois it is to be observed that their peculiar doctrine, it is believed, is applied only to provisions limiting the liability of common carriers—that they are decisions based upon the idea that the shipper, unless it is shown expressly that he gave express assent to the qualifying provisions, shall have remedy against a common carrier to the full extent of his unqualified liability. This was not such a provision. It weakened no security or remedy of a shipper. (Post, Point First, XIII,) Responsibility to the shipper was untouched by it. Even the Illinois decisions, to which reference is here generally made, therefore, it is claimed, do not apply to the case.

3. But, as has been said, it is hardly worth while to fully consider the decisions of the courts of Illinois in this respect. They do not control in the matter (Post, Point First, X). The decisions of the Federal Courts are not in consonance with them (Post, Point First, XI). It is believed that they, in this respect, stand substantially arrayed against controlling principle, and against the decisions of the courts of other commercial states and communities. There are other considerations beside, which show that these decisions of the courts of Illinois will not control decision here.

X. Upon such questions this Court will not, even if this were a case at common law, be controlled, and except in so far as such decisions are, in themselves, worthy of attention and respect--will not be affected in its decisions, by the decisions of state courts.

1. For a reason, perhaps not so well supported as others which will be referred to, it may be said that the decisions made in Illinois should not affect the decision of this case here. The question in this respect is not as to any form to be observed in making a contract, or as to its validity as a matter of state policy or otherwise. The suit is brought upon these contracts (Post, Point First, XXII), or at the very least they are before the court as to the transactions. The question is really one of evidence - what shall be deemed sufficient evidence of the assent of a party to the contract and as to such questions necessarily the *lex fori* must prevail. It is hardly worth while to occupy space with full discussion of this point, or to consider cases which might be regarded as bearing upon it (*see Lawson on Contracts of Carriers, sec. 211,* and cases cited), but in Massachusetts the point has been held as contended for here.

Hoadley vs. Northern T. Co., 115 Mass. 304.
Scudder vs. Union National Bank, 91 U. S. 406, 413.

And perhaps, if it be a matter of any consequence, it may be said that the law of the place of the performance of the contracts, or of the place where the grain was damaged [and which, as it was about ten miles south of Milwaukee (p. 39), was in the State of Wisconsin] should, as to the matters now considered, govern, rather than the law of Illinois, especially as the appellee was a Pennsylvania corporation.

Brown vs. Camden, etc., 83 Pa. St. 316.
2 Wharton on Contracts, 876.
2 Parsons on Contracts, 583.
Post, Point First, XI.

2. But it is of course well settled that as to such questions this court will not be controlled by the decisions of state courts. Nor, it is contended, will the statute which it is supposed will be referred to on the part of the appellant (Post, Point First, XVIII) control in this case.

"The laws of the several states * * * shall be "regarded as rules of decisions in trials at common law, in "the courts of the United States, in cases where they apply" (*2 R. S. U. S., sec. 721; 1 Statutes at L. 92, sec. 34*). It is intended to occupy but little space as to these things, but merely to refer to some decisions relating to them.

1. As to the general rule as to such questions of general commercial law:

Swift vs. Tyson, 16 Peters, 1.
Oates vs. National Bank, 100 U. S. 239.
Railroad Company vs. National Bank, 102 U. S. 14.
Myrick vs. M. C. R. R. Co., 107 U. S. 102.

2. As to the statute and some of the questions in this case:

Post, Point First, XVIII.

XI. Where a bill of lading with respect to such a transaction, was made, issued, delivered and received as these were, it is the doctrine of the Federal Courts—of the courts of all the states, it is believed, unless it may perhaps be Illinois (Ante, Point First, IX, 2; Post, Point First, XVII), of Great Britain, and, it is believed, of the general commercial world, that it shall be regarded as the contract of affreightment in the case to which it applies, and that all parts thereof shall apply to and bind the parties respectively, unless it be, of course, such parts as may be illegal or void as against general public policy, which was not the case (Post, Point Second, XVI) with respect to the clause now under consideration. To go into full consideration here of the law in these respects would require far too extended space. Some of the decisions bearing on the subject will be merely cited, and language of some of the text writers as to the matter will be only referred to.

Bank of Kentucky vs. Adams Ex. Co. 93 U. S. 174, 188.
Wertheimer vs. Penn. R. Co. 1 Fed. R. 232.
Van Schaack vs. Northern T. Co. 3 Bissell, 394.
Grace vs. Adams, 100 Mass. 505.
Pemberton Mills vs. N. Y. C., etc., 104 Mass. 144.
Hoadley vs. N. T. Co., 115 Mass. 304.

McMillan, et al., vs. M. S. & N. I. R. R. Co., 16 Mich. 79.
Boorman vs. Am. E. Co., 21 Wis. 152.
Mulligan vs. Ill. C. R. Co., 36 Iowa, 101.
The St. Louis, etc., vs. Clary, 77 Mo. 634.
Snider vs. Adams, 63 Mo. 376.
Cincinnati, etc., vs. Pontius and Richmond, 19 Ohio St. 221.
Indianapolis, etc., vs. Remmy, 13 Ind. 518.
Phifer vs. Railroad Co., 89 N. C. 311.
Hill vs. S. B. & N. Y. R. R. Co., 73 N. Y. 351.
Kirkland vs. Dinsmore, 62 N. Y. 171.
Maguire, et al., vs. Dinsmore, 56 N. Y. 168.
Farnham vs. Camden, etc., 55 Pa. St. 53.
Lewis vs. The G. W. R. Co., 5 Hurls. and N. 867.
York N. & B. R. vs. Crisp, 23 L. J. (N. S.) C. P. 125.
Stewart vs. L. & N. W. R. C., 33 L. J. (N. S.) Ex. 199.
Edwards on Bailments, sec. 561.
Lawson on Contracts of Carriers, secs. 102, 113.

XII. Nor is the case of *Railroad Co. vs. Manufacturing Co. 16 Wallace, 318*, opposed to the doctrine contended for here as applied to this case. There the decision was as to a *notice* upon the *back of a receipt*. There it does not appear that it was, as here, understood, that a bill of lading (which of course would be the evidence of the contract), should issue. There it does not appear that there had been former transactions between the parties. There it does not appear that the shipper knew the terms of the instrument, and had often shipped property under similar contracts, or had every opportunity of knowing the contents of the instrument by repeatedly shipping property under similar contracts (Ante, Point First, IV, V, VI). There the original transaction did not take place at a great commercial centre, where it is to be presumed the courses of business are known (for courts will take notice of them, Ante, Point First, VII) and there the contract was not such an instrument as these maritime bills of lading, instruments known to the law-merchant from immemorial time. And these considerations also apply to *Ayres vs. The Western Transportation Company, 14 Blatchford, 9.*

XIII. And, beside, it is to be remembered that the provision here was one not lessening the liability of the carrier to the shippers—not lessening the security or remedy of the shippers. It is not obnoxious to any rule for the protection of public policy (Post, Point Second, XVI). It is merely a provision that, under certain circumstances in no manner opposed to the interest of the shippers, the carrier shall have the benefit of any insurance upon or on account of the property—the benefit of this proper provision (Post, Point Second, XVI). Such was not the character of the provision under consideration, for instance, in *Railroad Co. vs. Manufacturing Co.* (Ante, Point First, XII). There the provision under particular consideration was one materially affecting the liability of the carrier.

XIV. Nor does the fact as found, that the vessel had started with the property on board, before the bills of lading were delivered, affect the question here. Does any one suppose that such property would be carried by such a carrier without a bill of lading? It does not appear that the shippers knew that the vessel had started. It was understood that bills of lading should issue when the preliminary agreements were made. Does any one suppose that any of the shippers could or would have protested against any of the provisions of the bills of lading, and lost opportunity to do so effectually, because the vessel had started? Nothing appears to show that they desired to do so, and, on the contrary, when the insurer took any rights it did take, if it took any (as to the remnants of the property, for instance), under the instruments made to the insurer, the shippers recognized and affirmed the bills of lading and the insurer took, subject to their provisions (Post, Point Second, XI). Suppose that loss of this property had occurred by collision without fault on the part of the vessel of the carrier, could shippers or insurer have made the appellee liable therefor, even if there had been no provision in these bills of lading as to insurance? Nor does the case of *Bostwick vs. The B. and O. R. R. Co., 45 N. Y. 712*, weaken this position. There a complete preliminary verbal contract was made. There it does not appear that there was any tacit understanding that bills of lading should be issued, although the shipper sent his receipts for the property (it does not appear that these receipts stated any of the terms of the contract for carriage) to the agent of

the carrier to obtain them. There it does not appear that the shipper had "often" and "repeatedly" shipped property by the same carrier, under similar bills, and "knew" the contents of the bill afterwards delivered, or had "every opportunity" to know its contents, etc. (Ante, Point First, IV, V, VI). *There it appears there was an "all rail" rate of $1.60 per hundred pounds, which the shipper agreed to pay—the "rail and water" rate being $1.50, and the property was lost while being carried upon the water.* There it would indeed have been a wrong to have imposed upon the shipper, provisions the opposite of what he contracted and agreed to pay for when he agreed to pay $1.60 per hundred for an all rail carriage, although the all rail rate was stated in the bill of lading which, however, he did not notice. There there was no subsequent virtual affirmance of the bill of lading as there was here as to these bills. That was not an action by an insurer claiming under an instrument which virtually affirmed the bill of lading (Post, Point First, XXI).

And see, as bearing on this case and point:

Hall vs. Penn. R. Co., 112 U. S. 331.
Wilde vs. The Merchants' Dis. T. Co., 47 Iowa, 272.
The St. Louis, etc., vs. Clary, 77 Mo. 634.
Germain F. I. Co. vs. M. and C. R. Co., 72 N. Y. 90.
Hill vs. S. and B., etc., 73 N. Y. 55.

XV. And this brings into view the question of consideration. It is supposed that it will be contended on the part of the appellant that there was no consideration for this particular provision. It is of no consequence if there was no definite, separate, fixed consideration for this provision. The rates of freight were fixed in the preliminary verbal agreement, and were so fixed *with reference to the bills of lading, which were to be issued.* Take any bill of lading in ordinary use by such a line, is it to be supposed that the carrier must, in substance, by reduction of freight, or the shipper, in substance, by increase thereof, or otherwise, pay specific and separate consideration for each provision of a bill of lading as it might be in favor of one or the other, with as many different rates of freight for doing business as there might be combinations of the different provisions—so much less or so much more for this style or for that, and so on for, let us say, an hundred different rates? The rates, it is repeated, were made with reference to the bills of lading of the line which were to be issued.

And the finding is in accordance with this view. When the bills of lading were delivered and received "without protest or objection," the shippers did not "specially" read the terms and conditions thereof, etc., and "no reduction of freight was made from the rate *stipulated in said verbal agreement* in consequence of said terms and conditions or other consideration paid therefor." Why should there have been any reduction from the rate of freight fixed with reference to the bills of lading? And why should there be any other consideration than the reduction which the law will presume was made in consideration of the terms thereof? The bills of lading were each an entirety, as was the rate of freight agreed to be paid—each as indivisible as the other.

Hall vs. Penn. R. Co., 113 U. S. 331.
Railway Company vs. Stevens, 95 U. S. 655.
Oppenheim vs. U. S. Co., 69 Ill. 62, 67.
Field vs. Chic. and R. I. Co., 71 Ill. 458.
McMillan, et al., vs. M. S. & N. I. R. R. Co., 16 Mich. 79, 116.
Mercantile M. I. Co. vs. Calebs, 20 N. Y. 173, 176.

Nor can the idea that common carriers are compelled (under ordinary circumstances) to carry property offered for carriage have any real bearing on the question. That such is the law is of course indisputable and undisputed here. They are so required to carry property for a reasonable compensation. But they are not required to carry property beneath severe and unqualified liability, for the same compensation that they should receive for its carriage beneath a bill of lading containing proper and reasonable provisions. Is a shipper to have the benefit of a reduction of freight which the law presumes is made in such a case as this, and can he or his transferee be permitted to thrust out of the contract of affreightment the clauses which caused the reduction?

See cases last cited.

XVI. No reference has been as yet made to the doctrine that previous parol understandings are merged in written agreements afterwards delivered and received, covering the same matter. But that the rule preventing parol understandings from qualifying written agreements is as strong here as in other cases where such parol understandings are excluded, is apparent.

The Delaware, 14 Wallace, 579, 603, 606.
Ante, Point First, XI.

XVII. Upon another familiar principle this provision must be regarded as a part of the contracts of affreightment. Here were all the elements which create an estoppel. The shippers had "often" and "repeatedly" shipped property under similar bills. They received these bills issued pursuant to the tacit understanding "without protest or objection." They respectively "knew," or had "every opportunity," from having "often" and "repeatedly" shipped property under similar bills, to know the contents of these respectively. If they were ignorant of them, they were designedly, or with culpable carelessness, ignorant of their contents. In any view the carrier had a right to suppose the contents of the bills of lading were so known and that the business was being done under them. Under such circumstances the shippers were estopped from claiming that they were ignorant of the contents of the bills. Such plain injustice as would be done were the carrier now to be regarded as if there were no bills of lading in the case and as if, for instance, the property was to be carried under the severe liabilities under which, without a bill of lading qualifying such liability, a common carrier does business, should not be done.

Breese vs. The U. S. T. Co., 48 N. Y. 132.
Stagg vs. Insurance Co., 10 Wallace, 589.
Wilson vs. Krymer, 1 M. & S. 157.
Lewis vs. The G. W. R. Co. 5 Hurlstone & N. 867.
Beardsley vs. Foot, 14 Ohio St. 414.
Wolf vs. Western U. T. Co., 62 Pa St. 83.
Kirkland vs. Dinsmore, 62 N. Y. 171.
Bigelow on Estoppel, 471, and cases cited.
1 Greenleaf on Ev., sec. 207.

And although, but without considering the question, it is said in *Erie and W. T. Co. vs. Dater, et al., 91 Ill. 195*, that the doctrine of estoppel does not apply in such a case—see even the following Illinois cases:

Merchants' D. & T. Co. vs. Moore, 88 Ill. 137.
Oppenheimer vs. U. S. E. Co., 69 Ill. 62.
Field vs. The C. & R. I. Co., 71 Ill. 458.
U. S. Express Co. vs. Haines, 67 Ill. 137.

In the case of *Erie and W. T. Co. vs. Dater, et al., 91 Ill. 195*, there was affirmative evidence that the shippers did not know the contents of the bill of lading. In the case of

Merchants, D. & T. Co. vs. Moore, 88 Ill. 137, where there was no such evidence (and there is no affirmative evidence in this case that the shippers did not know the contents of the bills of lading), the following language is employed in the opinion as to the bill of lading in that case: "We must "presume from the fact that the consignors were frequent "shippers by this line and in the habit of receiving like bills of "lading, that they were familiar with its contents, and hence "when they accepted it knew that it obliged the defendant "only to ship to the Chicago depot."

XVIII. Nor is there anything in the statute of Illinois, to which reference has been made and which is hereinafter set forth (Post, Point First, XVIII, 5), which can affect the case, even if the statute relates to such bills of lading as were given in in this case.

1. The statute in any view should not control this court in this case.

2. This, it is claimed, is true, so far as it relates to a commercial case which did not wholly arise in the State of Illinois—true so far as it relates to so much of this case, if it relates to it at all, as is matter of general commercial law.

Swift vs. Tyson, 16 Peters, 18, 19.
Watson vs. Tarpley, 18 Howard, 517.
Post, Point First, XVIII, 3, 4.

3. This is true as this is an action in admiralty and its trial was not a trial "at common law" (Ante, Point First, I, X).

The damage to the grain, if this be a matter of any materiality, did not happen in the State of Illinois. The vessel "was stranded on the western shore of Lake Mich-"igan, about ten miles south of Milwaukee," and therefore in the State of Wisconsin (p. 39).

But the statute can have no application to the case in any view. A state legislature cannot change the body of the admiralty law, or the remedies or rules of evidence of an admiralty court in any such way.

The Lottawanna, 21 Wallace 558.
The Barque Chusan, 2 Story, 455, 462, 464.
Ante, Point First, I, X.

4. The statute in so far as it relates to inter-state or foreign commerce is unconstitutional.

a. It is so far unconstitutional under the part (Article I, Section VIII) of the Constitution of the United States, which provides that Congress shall have power "To regulate "commerce with foreign nations and among the several "States and with the Indian tribes."

b. Congress has in various particulars regulated foreign and inter-state commerce, together or separately, and in the province to which the contracts of carriers relate, and therefore, even, if that were of any consequence, the matter does not stand as if Congress had not acted as to the subject.

It has regulated such commerce, both, or one or the other, in the provisions contained in Chapter One, Title XLVIII of the Revised Statutes of the United States, entitled "Regulations of Commerce and Navigation" (*R. S. of the U. S., secs. 4131–4196*); in the provisions contained in Chapter Five of the same title (*R. S. of the U. S., secs. 4233–4251*); in Chapter Six of the same title (*R. S. of the U. S., secs. 4252–4289*); in Title L, entitled, "Regulations of Vessels in Domestic Commerce" (*R. S. of the U. S., secs. 4311–4390*); in Chapter One of Title LII (*R. S. of the U. S., secs. 4399–4462*); in Chapter Two of the same title (*R. S. of the U. S., secs. 4463–4500*), and in other provisions, for instance, as to seamen.

As Congress has acted with respect to the subject, any state legislation which may affect the subject in its general aspects is unconstitutional (Post, Point First, XVIII, 4, *d, e, f*).

c. But even if Congress had not acted with respect to the subject, as the statute of Illinois attempts to regulate a general matter appertaining to inter-state commerce, and it expressly does this, for the attempt is to make it expressly applicable to property "received by a common carrier, to be "transported from one place to another within or without" the state (Post, Point First, XVIII, 5), it is still as to inter-state and foreign commerce unconstitutional and void (Post, Point First, XVIII, 4, *d, e, f*).

d. Although it may be valid as to the wholly internal trade of the state, it nevertheless may be invalid so far as it relates to inter-state trade or foreign commerce.

Sedgwick on the Construction of Statutory and Constitutional Law, 413.
Post, Point First, XVIII, 4, e, f, g.

e. But even if Congress had not acted, still as the matters to which the statute relates are not entirely matters local to the State of Illinois, the power of Congress is exclusive with the respect to the subject, so far as it relates to inter-state or foreign commerce, and the statute is void so far as it applies thereto.

Welton vs. State of Missouri, 91 U. S. 275.
Hull vs. De Cuir, 95 U. S. 485, 513.
County of Mobile vs. Kimball, 102 U. S. 691, 697.
Brown vs. Houston, 114 U. S. 622, 630.
Cooley vs. The Board of Wardens, etc., 12 Howard, 299, 319.
Post, Point First, XVIII, 4, f.

The rule is well settled, as to such general matters, that "So long as Congress does not pass any law to regulate "commerce among the several States, it thereby indicates "its will that commerce shall be free and untrammelled, and "any regulation of the subject by the States is repugnant" to the clause of the Constitution referred to (*114 U. S. 631*).

f. That this, in so far as it applies to inter-state commerce, or any bill of lading with respect thereto, if it can so apply, is an attempt to regulate such commerce, and is, therefore, so far invalid, must be apparent.

A bill of lading is so necessarily connected with the shipment and carriage of property that it becomes essentially a part of that "commerce," and the word includes within its meaning not only the traffic but the means of traffic and transit also, and any attempt by state statute to provide what a bill of lading shall contain or not contain, or as to its effect, so far as it relates to inter-state commerce, must be a regulation of commerce and therefore void. As to the character of a bill of lading in this respect, see

Almy vs. State of California, 24 Howard, 169, 174.
Woodruff vs. Parham, 8 Wallace, 123, 138.
Case of the State Freight Tax, 15 Wallace, 232, 253.

where, in determining that a state law attempting to impose a tax on a bill of lading as to property to be carried out of a state was a regulation of commerce, it must be determined that a bill of lading, within the meaning of the word "commerce," as so used, is substantially a part of that commerce and that its regulation, its contents, its substance, its meaning, are beyond the power of state legislation.

As to the meaning of the word "commerce" in this connection, and that it not only means the traffic itself but the means by which it is carried on, see

Gibbons vs. Ogden, 9 Wheaton, 1, 189, 229.
Case of the State Freight Tax, 15 Wallace, 232, 275.
Passenger Cases, 7 Howard, 275, 285, 462.
Welton vs. State of Missouri, 91 U. S. 275, 280.
Gray vs. The Clinton Bridge, 1 Woolworth, 150.
The Clinton Bridge, 10 Wallace, 454.
County of Mobile vs. Kimball, 102 U. S. 691, 697.
Webber vs. Virginia, 103 U. S. 344, 351.
Corfiels vs. Caryell, 4 Wash: Cir. C. R. 344, 378.
Pensacola, etc., vs. Western, etc., 96 U. S. 1.
And see cases next cited.

g. The statute, in so far as it relates to other than the purely internal trade of the State of Illinois, is unconstitutional and void.

See cases last cited and
Gloucester F. Co. vs. Pennsylvania, 114 U. S. 196.
Brown vs. Houston, 114 U. S. 621.
Telegraph Co. vs. Texas, 105 U. S. 460.
Moran vs. New Orleans, 112 U. S. 69, 75.
Henderson, et al., vs. Mayor, etc., 92 U. S. 259.
Passenger Cases, 7 Howard, 280.
Pacific Coast Steamship Co. vs. Board of Railway Com'rs, 18 Fed. R. 10.
The Daniel Ball, 10 Wallace, 557.

5. But the statute does not apply to such transactions as these. It is entitled and provides as follows:

"An act to fix the liability of common carriers receiving "property for transportation"

"Whenever any property is received by a common car- "rier to be transported from one place to another, within "or without this state, it shall not be lawful for such carrier

"to limit his common law liability safely to deliver such "property at the place to which the same is to be trans- "ported by any stipulation or limitation expressed in the "receipt given for such property."

3 Gross' Stat. of Ill. 58.

The object of the statute is apparent. It provides that a *common carrier* shall not limit his common law liability by anything contained in a *receipt*—that one party shall not limit his liability. It does not provide that the parties to a bill of lading—a bill of lading as this court will take judicial notice, usually only signed by the carrier or his representative, the bill issued by the carrier being really the bill of lading—

The Thames, 14 Wallace, 98.
Ante, Point First, VIII.

—it does not provide that such a bill of lading cannot be made by the parties thereto; that the parties to a bill of lading cannot (the carrier by the issuance of the bill and the shipper by its receipt as such bill) make contract for limitation of the extreme liability of a common carrier. Such a statute has no such meaning, would not be held to have such meaning, unless that meaning were expressed in the plainest terms, could not have such meaning without—were it fully effectual—inflicting a most serious injury on the commercial prosperity of the State of Illinois. If the statute should have such meaning and full effect, not a contract could be made in Illinois mitigating the severe liabilities of a common carrier at common law; a railroad company could not, for instance, there contract with this appellee for the carriage of a thousand tons of rails and the carrier be less liable than at common law. Certainly, a business community would not be willing that upon the great interests employed in the carriage of property and all that awaits upon its prosperity, should fall such burden—a burden which would fall, at least in large result, upon the shipper (for the freight would be apportioned to the risk, Ante, Point First, XV), and to the obstruction of business transactions to an immeasurable extent.

These were not "receipts." They were bills of lading (Ante, Point First, VIII), and the statute, as it is not applicable to bills of lading, therein, exhibits the legislative recognition of much to which allusion is here made, absolutely necessary to the commercial prosperity of the State of Illinois.

But, beyond all this, it is apparent that the particular provision of these bills of lading now under consideration does not limit the liability of the carrier "to deliver" the property "at the place to which the same is transported." The provision is merely as to the benefit of insurance, should any be obtained by the shipper. The liability to deliver remains the same. The statute was for the protection of the shipper, and no part of that protection is lost by such a provision as this.

XIX. Another consideration materially affects the question here in several aspects. This is not a case standing in such a position as actions brought to enforce the insurances would occupy in one most important particular. The insurer has paid the amounts insured (Post, Point Second, XIII, XIV). By such payment the insurer has placed itself in such position that it cannot here avoid any consequence of its act unless upon some such ground as fraud or mistake, and in an action where, for instance, such fraud or mistake is properly alleged; and even where such allegation is properly made the burden of proof is upon the appellant, in any view, in many most important regards. This is expressly held (Post, Point Second, XIV) in *The Sidney, 23 Fed. R. 88, 96*, and the language of this court in *Hooper vs. Robinson, 98 U. S. 528, 540*—a case where the recovery back of insurance money once paid was sought—should apply: "It was incumbent "upon them to establish everything necessary to entitle "them to recover, and they have no right to throw upon "the defendant any part of the burden that belonged "to themselves." And these considerations are important. They affect almost every question raised in the case, and—aside even from the very important point that these payments inured to the benefit of the appellee and the appellant cannot go behind them, which will be subsequently considered (Post, Point Second, XIII, XIV)—show that the appellee is entitled to the benefit of the provisions.

1. They show that it must be regarded—for it does not appear that the appellant has shown to the contrary—that the shippers respectively knew all the contents of the bills of lading respectively and accepted them as they were.

2. They show that it must be regarded here that the contracts of insurance were so made with such knowledge—for it does not appear that the appellant has shown to the contrary—that if there could have been any fact which would have invalidated the insurance or prevented the appellee from having the benefit of the provision with respect thereto, such fact does not appear here, and that as the appellant has neither alleged or established such fact, if there were any, it cannot here avail itself thereof.

3. They show that here when these insurance moneys were paid, they were so paid that the appellant cannot in this case, for it has neither alleged or established reason therefor, go behind such payment (Post, Point Second, VI, XIII, XIV).

XX. Such being the law, that the burden of proof is upon the insurer in such a case to establish such facts as would enable it to recover, and that in the absence of proof as to a material fact, the presumption will be against the insurer some aspects of the case could hardly be properly considered without reference to it. It really is of no consequence whether or not the insurances were made after or before the delivery of the bills of lading (Post, Point Second, V, VI, VII, VIII, IX, X). The insurance was of "goods and merchandise laden or to be laden" (p. 35). The finding states that the preliminary agreements were made on the twenty-fourth of July, 1874, and that it was tacitly understood that bills of lading would subsequently issue to the shippers (p. 40); that "during the even-"ing of July 24th, 1874, said propeller completed the "lading on board of said shipments and about mid-"night departed on her voyage" (p. 39), and that the bills of lading were delivered "after said property had been "received on board and said propeller had departed on her "voyage" (p. 40).

It was not impossible, therefore, that the insurance was made on the twenty-fourth of July, 1874, and after the bills of lading had been delivered, especially as, although in the preliminary agreements no vessel of the appellee's line, of which the Merchant was one, was named (pp. 40, 33), the certificates of insurance, dated July 24, 1874, state the property to be "on board" the Merchant (pp. 34, 35).

Probably the bills of lading should be regarded as made at the time of the preliminary agreements, as it was then understood that they should issue (p. 40).

Hill vs. L. B. & N. Y. R. R. Co., 73 N. Y, 351, 353, The Delaware, 14 Wallace, 579, 600, 601.

But it is really of no consequence here, whether the bills of lading were delivered before or after the insurances were made. The insurer knew the contents of the bills of lading, or must be regarded as having known, what courts will take judicial notice of (Ante, Point First,VII), that such property would not be carried except under a bill of lading, and therefore are chargeable with notice of the contents of such bills, especially as in the contracts of insurance no provision is made to qualify the right of the insured completely to control or do what they pleased with the property or the contracts of insurance (Post, Point Second, X). Beside, as has been already said, it makes no difference here whether or not the contracts of insurance were made before or after the bills of lading were delivered (Post, Point Second, V, VI, VII, VIII, IX, X), and this, especially as it is impossible that the appellant can claim here that these contracts of insurance were not binding, or that there was any defence thereto (Post, Point Second, IV, V, VI), and, if it could so claim, even if it had made proper allegation to permit such proof, the burden is on the appellant to show all the facts which would enable it so to claim —whether or not the bills of lading were delivered before or after the contracts of insurance, if the time of such delivery could be of consequence —to show anything which would invalidate the insurance, or be a defence to claim therefor, if it could so show anything, to show affirmatively, for instance, if that made any difference, that it did not know the contents of the bills issued, or to be issued, and that its want of such knowledge arose from breach of duty on the part of the shippers, and was material to the risk. (Ante, Point First, XIX; Post, Point Second, IV, V, VI. XII, XIV.)

But nothing of the kind has been alleged or shown by the appellant, and the contrary is alleged and has been acted upon by the appellant, and is found in the finding (Post, Point Second, IV, V, VI). It must be assumed, therefore, if it is material, that the insurer really knew and assented to the contents of the bills of lading, and that if the presence of the insurance clause therein was a material fact, that it received a larger premium on that account, as

the rates of freight having been fixed with reference to the bills of lading and their provisions, it will be presumed that a less freight was charged on account of such provisions (Ante, Point First, XV), or that it received premium sufficient to compensate it, no matter what the bills of lading might contain.

XXI. And the losses were paid in accordance with these views.

All the instruments made when the losses were paid (aside from all else that may be said respecting them, Post, Point Second, XI) state that each shipment was made "*as per bill of lading*" (pp. 39, 40). More than probably the bills were then delivered to the insurer as (Post, Point First, XXII) the libel counts upon them. In any view it took whatever it took, if it took anything, with notice of the bills and at least chargeable with notice of their contents, and took subject thereto. The shippers, as fair business men would do, recognized and affirmed the bills of lading, and only sought, respectively, to transfer their "right, title and interest" in any case (Post, Point Second, XI). And is the carrier to lose what it paid for? Is the insurer to have what it was agreed it should not have? Is it to say that, in substance, as to this provision there was no bill of lading, when it took with reference to them? Is it to be permitted to disaffirm what parties, in whose place it claims to stand, in making transfer, absolutely recognized and affirmed?

It is not enough to claim that the carrier shall not have the benefit of this provision under specious claim as to the consideration for the provision, or by quotation from the finding that "the libellant, at the request and expense of the shippers, respectively, insured them," etc. The first has been already considered and its fallacy shown (Ante, Point First, XV). The second really falls within what has been said with reference to the consideration. The premiums were in effect paid to the shippers by the carrier (Ante, Point First, XV). The finding with respect to the procuring the insurance relates to the transactions as between insurer and shippers, and not as between the shippers and the carrier. Of course, the shippers procured the insurance. Of course, the expense thereof, the expense as between the insurer and the shippers, was paid by the latter, as it should

have been, for they had had the benefit of it in the reduction of freight in the contracts of affreightment (Ante, Point First, XV).

XXII. In every view the insurer should not be permitted to disaffirm this provision. It should not for reasons which have already been shown. It should not, for it has affirmed them in counting upon them in the libel, and cannot affirm them in part and disaffirm them in part under familiar rule. The libel states that the several shipments were to be carried and delivered "loss or damage by fire, collision, or the dangers of seas, bays, harbors, rivers, lakes or canals only excepted." (The words "and canals" is used in the place of "or canals" in one case, pp. 2, 3, 4.) The word "only" is used in apparent attempt to repudiate other special provisions of the bills limiting the liability of the carrier to deliver. But no such provision as to fire, collision, etc., appears to have been even spoken of in the verbal preliminary agreements. The libel evidently counts upon the bills of lading which provide that there shall be no liability "for loss or damage by fire, collision, or the dangers of navigation while on seas, bays, harbors, rivers, lakes or canals" (p. 27).

Is it not apparent that these bills were delivered to the libellant with the instruments delivered when the losses were paid—the instruments which recognized and affirmed the bills, the instruments under which the libellant took whatever it did take, if it took anything—the bills which it cannot affirm in part and disaffirm in part under familiar rule—and cannot affirm or act upon or take benefit from any part of either the bills of lading or of the instruments under which it took, if it took anything, without being bound by the whole.

Herman on Estoppel, 461.
Maynard vs. Maynard, 4 Edwards' Ch. R. 711, 716.

XXIII. Nor was the carrier under obligation to give the insurer notice that it was entitled to the benefit of the insurance. There was no obligation on the part of the shippers to insure. It does not appear that the carrier knew, nor would it necessarily know, who the insurer was or that there was any insurance, so that notice could be given. Nor was the carrier to be supposed to know that the insurer did not know what it knew or was chargeable

with knowledge of. (Post, Point Second, XIII, XIV). And why should the carrier give any such notice in any view? The carrier was entirely willing that the insurance money should be paid to the shippers, as it was, for that extinguished the claims of the shippers, and extinguished the liability of the carrier.

Kernochan vs. The N. Y., &c., 17 N. Y. 428.

XXIV. Again, had the insurer desired to have protected itself as to any such result as here takes place, it should have provided in its contracts of insurance (if it could then have used them—got them taken in a business community), that in case of anything which should lessen anything it might take by subrogation or assignment in case of loss, the contract of insurance should be void—should have exacted from the assured in substance a warranty against any thing which otherwise might defeat or lessen any right the insured otherwise might take.

There is nothing of the kind here—not even a restraint upon the right of the insured to transfer the property or the contracts of insurance themselves. The insured were left to dispose of either as they should choose (Post, Point Second, X.)

XXV. It will, perhaps, be contended on the part of the appellant, that by the terms of the bill of lading the provision as to insurance did not apply to cases where the loss should be "through the negligence of those managing the propeller" (p. 39), that it will not so apply for the reason that it is not expressly stated that it should, and as in some courts it has been held—in the courts of New York for instance—that although a common carrier may exempt himself from liability for the negligence of employees, it cannot be done under general language. It is apparent that such is not the rule of construction which should apply to this provision in the bills of lading It is understood to be the contention on the part of the appellant, in claiming that the clause is void as against public policy, that the appellee provided for exemption from liability for everything except negligence (Post, Point Second, XVI). If this be so, then it must be apparent that the clause by express provision must apply in such a case as this, for the appellee by its provisions, is not to have the benefit of it unless it is liable. But the rule in this respect is *as to the*

intent of the parties, and the decisions referred to in this connection hold that general language, as to exemption from negligence shall not receive such interpretation for the the reason that it will not be concluded that it was the intent of a shipper, that the carrier should not be liable for negligence, unless it is provided by express provision that he should not be.

M. J. S. N. Co. vs. Merchants Bank, 6 Howard, 344. Mynard, et al. vs. Syracuse, etc., 71 N. Y. 180, and cases cited.

But such is not the case here. The security of the shippers was not lessened by the provision. The shipper would not hesitate about making such an agreement, for he would not be bound to obtain any insurance and his security would not be lessened by the provision, and the more he gave the carrier, the less would be the freight to be paid (Ante, Point First, XIII, XV).

There is no reason for saying that the carrier should not have the benefit of the provision, as to any liability it might incur.

XXVI. It is presumed, also, that it will be claimed on the part of the appellant, that this case is like some cases where, although an obligation seems to be incurred, it is so weakened by actual provision of the contract as to become no obligation, and to claim that these bills of lading which, while, providing for liability, also provided that there should be none. Of course this is not so. The liability under these bills of lading was as to the shippers perfect, and in no sense destroyed by the provision.

XXVII. It must appear from manifold considerations, already referred to—upon principle—upon authority and upon grounds of natural justice—that the appellee is entitled to the benefit of this provision. And this will the further appear in considering what the provision really is and what benefit the appellee derives therefrom (Post, Point Second).

POINT SECOND.

The appellee being entitled to the benefit of the clause relating to the insurance contained in each of the bills of lading this action cannot be maintained.

I. No direct action could be maintained against the appellee founded upon any supposed claim on the part of the insurer—none that is, in any such case, except upon such rights, if any, as an insurer may derive from the insured. If, as a matter of practice, in admiralty, an insurer may be libellant, that does not change the merits, so to speak, of the action. The privilege of the insurer to sue in its own name is one merely for convenience, and the insurer in any such case only sues upon a derivative claim—only occupies the place of the party as to whose right or supposed right, it seeks to maintain an action. The rights of parties are not changed by such regulation as to the practice.

That such is the law appears upon principle, for the insurer is in no such privity with the party sought to be charged in such a case and that party owes the insurer no obligation or duty, which would enable the insurer to maintain such action. That such is the law appears from overwhelming authority, No action can be maintained by the insurer in this case unless the insured respectively, in their own names respectively, and for the benefit of each of them respectively, could maintain such actions.

Mobile, etc., vs. Jurey, 111 U. S. 584, 594.
Hall & Long vs. Railroad Companies, 13 Wallace, 167, 172, and cases cited.
The Propeller Monticello v. Mollison, 17 Howard, 152.
Rintoul vs. The N. Y. C. etc. 21 Blatchford, 419, 444.
Simpson vs. Thomson, Eng. L. R. 1 Appeal cases (H. of L.) 279.
Con. Mut. I. Co. 1 Cov. N. Y. etc. 15 Conn. 165.
Peoria Ins. Co. vs. Frost, 17 Ill. 111.
Gardner vs. Hart, 3 Denio, 232.

As this is so (and in this case it is more strongly so, if possible, for the reason that the shippers gave such rights, if any, as they gave the insurer, subject to these bills of lading, Ante, Point First, XXI, Post, Point Second, III, XI, XIII)—as this is so, no consideration with respect to any

assumed rights of the appellant or anything as to any supposed equities in its favor, even if there were any, has anything to do with the case. But this case is even much stronger in favor of the appellee than it would be had the shippers brought action after receiving the insurance money. Here the insurer took what it did take, if it took anything, under express affirmation of the bills of lading, and which the insurer cannot disaffirm (Ante, Point First, XXI, XXII).

Could any of shippers here, after receiving the insurance money, the benefit of which they had agreed the carrier should have, and expressly affirming the bill of lading in which it had so agreed, maintain such an action as this? Of course not. And that is the question in this respect here, stated most strongly in favor of the appellant.

Ante, Point First, XIII, XXI, XXII.
Post, Point Second, XI, XIII.

II. The whole subject—the bills of lading, the contracts of insurance, all connected with the matter, were within admiralty jurisdiction and remedy, and the defence of the appellee arises out of the transaction. The whole matter, in any view which can be taken of it, can be litigated in this action.

Ante, Point First, I.
Insurance Company vs. Dunham, 11 Wallace, 1.
Bradstreet vs. Heron, Abbott's Ad. R. 209, 214.
Zeregan vs. Poppe, Abbott's Ad. R. 397.
Beares vs. Rope, et al., 1 Sprague, 331.
Matcher vs. McCulloh, Olcott, 365.
The New Phœnix, 2 Hagg, 420.

III. It is supposed that it may be claimed on the part of the appellant that abandonments were made to the insurer, and that, therefore, by some virtue inherent therein, the claim of the insurer may be strengthened thereby.

1. An abandonment, of course, proceeds only from the party making it, and can change no right of any other party, can add nothing to the position of an abandonee except, when accepted, to transfer to the abandonee such rights as may pass by abandonment, *subject, of course, to the rights of every party as to the party making such abandonment*, and in this case expressly subject to this provision in the bills of lading.

Ante, Point First, XIII, XXI, XXII.
Ante, Point Second, I, XI, XIII, XVI.

2. But what were the instruments under which the libellant only can claim here? What, for instance, was the instrument made by A. M. Wright & Co.? It provides that for and in consideration of the amount in which they were insured they did "assign, transfer, cede and abandon" all their "*right, title and interest* in and to the property "hereinafter specified, and to all that can or may in any way "be made, saved or realized from the damage or loss reported "to have occurred, by reason of which a claim of payment "has been made by us, with full power to take and use all "lawful ways and means (at the risk and expense of the "Phœnix Ins. Co.) to make, save and *realize the said prop-*"*erty*, to wit, 16,325.34 bushels of corn, *as per bill of lading* "and invoice *shipped* on board the propeller Merchant, bound "from Chicago for Erie and *covered by insurance* with the "Phœnix Ins. Co. by open policy," etc.

"To the extent of the interest of the said Phœnix Ins. "Co. in said property."

And the other instruments of the kind, except that they do not contain this last provision, are similar to the one made by A. M. Wright & Co., as to the respective shipments of the others (pp. 39, 40).

It well may be said that the instruments, besides what else may be said of them, do not assume to work transfer or assign claims against the carrier. They merely assume to work transfer of or assign all the "right, title and inter-"est" of those, respectively, making them, "in and to the "property," * * * and to "all that can or may be *made*, "*saved or realized* from the damage or loss, * * * with "full power to take and use all lawful ways and means "* * * * to *make, save and realize the said property*, as "per bill of lading and invoice, shipped on board the propel-"ler Merchant." These, certainly, are not apt words to transfer or assign a cause of action. Construed with the bills of lading as forming part of the same transaction as they should be, under familiar rule, it is claimed that affirming the bills of lading containing this provision, as the shippers did, they did not even assume to transfer causes of action which did not exist (Post, Point Second, IX, XIV), and the instruments, under all the circumstances, considered as abandonments or assignments, will be construed to merely work transfer or assign (if they have any effect) rights as to the *property*—the grain abandoned. And this will be especially true with respect to the instrument made by A. M. Wright

& Co., the shippers who shipped more than five-sixths of the amount of the whole shipments (pp. 33, 34), for the instrument is expressly limited to the extent of the insurer in the *property* (p. 39).

And such construction of the instruments would accord with all the facts, all the circumstances of the case—that while the instruments may have worked transfer of or assigned the remnants of the property, they did not undertake to work transfer of or assign any cause of action.

And these are the instruments which must govern as to the transactions. It does not appear that there was any other abandonment, and had there been there was no other acceptance, and acceptance of an abandonment is necessary to enable transfer to be worked thereby.

2 Parsons on M. Ins., 499.
2 Arnould on Ins., 1180.*

In the case of *The Manistee, 7 Bissell, 35; 5 Bissell, 381,* there was an *actual* total loss and unquestioned liability on the part of the insurer, and the circumstances of the case were peculiar.

3. Taking under such instruments, the appellant is bound by them. It takes at least with notice of, and therefore chargeable with knowledge of the bills of lading which the shippers took as such, and which the shippers, in the instruments, not only recognize and affirm, but in effect make the instruments subject to. If subject thereto, they are of course subject to every part thereof, and one part thereof is that the carrier shall have the benefit of the insurance. Paying the money at least subject to such knowledge, and taking, if anything, all it did take, as is claimed, subject to the bills of lading, making no objection with respect thereto, how can it be said, even in this single view, that the insurer can repudiate any part of the bills of lading, can repudiate what the parties making transfer acknowledged and affirmed, or that the money was paid otherwise than as was provided in the bills of lading, for the benefit of the carrier?

4. But to return to the supposed claim on the part of the appellant. It is supposed the claim will be that because an abandonment is in some cases, necessary to enable a claim for constructive total loss to be sustained, and because an abandonment made and accepted may, *as to some things*, relate back to the time of the loss, that there-

fore and before an abandonment is made the insurer has a settled or vested interest in or as to anything which might be the subject of an abandonment, which would prevent anything which might destroy or lessen such interest, even as to the party against whom such claim is made as is made here. Such claim may perhaps be specious. It is not tenable here. An abandonment of course does not create a cause of action or affect the merits thereof, except in so far as it may enable a party, in a proper case, to recover for a constructive total loss, when without it recovery could only have been had for a partial loss. An abandonment and acceptance thereof, in a proper case, work transfer of such interest in the remnants of the property and, in a proper case, in claims the party making the abandonment may have, if any he has, *but subject of course to every right and equity existing between the party making such abandonment and any against whom such claims are urged.* An abandonment and acceptance, if they relate back to the time of the loss or damage or the arising of the cause of action do so only in the sense that from that time, with respect to the property and expense as to it or any cause of action, if any the insured may have against a party causing the loss, the abandonee may perhaps take as of that time, *subject, however, to everything that may exist to qualify or defeat such claim, subject to the rights of a carrier, for instance, as between him and the shipper.* An abandonment and acceptance do not relate back to a time before the happening of the loss, and in effect defeat what had been before done here.

2 Parsons on M. Ins., 194.

Ante, Point Second, I

5. It is presumed that it will be claimed upon the part of the appellant, that an abandonment is a condition precedent to a cause of action as for a constructive total loss, and that, therefore, no cause of action arose here until it was made, that the carrier must be presumed to have made its contract with such knowledge of the law, and that, therefore, the abandonment which was a necessary element in the cause of action by operation of law transferred that cause of action to the insurer.

a. The question is not as to the cause of action against the insurer. The question is as to the cause of action, if any, against the carrier. Certainly the abandonment as such and of itself, or an abandonment and acceptance as

such and of themselves, would not create any liability on the part of the carrier. The payment of the money did defeat the liability, but that had nothing to do with an abandonment or acceptance as such.

b. But an abandonment is not a condition precedent to the liability of an insurer. It is elementary law that an abandonment is not necessary to enable a party insured to recover for a partial loss, or to recover for an actual total loss. In case of payment of a partial loss, or of an actual total loss, the insurer takes such rights as it should take, if it should take any, irrespective of any abandonment. An abandonment is merely something necessary in a proper case to enable a party insured to recover for a constructive total loss. It is no more effectual as a transfer of property, even when accepted, than would be a payment for an actual total loss. And here the insurer really only took such rights, if any, as it did, by virtue of instruments which it took upon making such payment, and subject to their respective provisions (Ante, Point First, XXI; Ante, Point Second, III). The insured abandoned, the insurer paid the losses with knowledge, or at least chargeable with knowledge, of the contents of the bills of lading (Ante, Point Second, III), and whether with such knowledge, or so chargeable, or not, subject thereto and to the instruments executed to it by the insured (Ante, Point Second, III, 2, 3), and really before so taking whatever it did take—an interest, perhaps, in the remnants of the property insured—paid the shippers money to which the carrier was entitled, and thereby extinguished the claims against the carrier, and no claim existed which could pass to the insurer, by operation of law or otherwise.

IV. Nor can it be successfully claimed that the insurer was not liable to pay the insurance money.

1. This is unquestionably apparent.

a. The libel alleges that the appellant made these insurances (pp. 2, 3, 4). Therefore, they must be regarded as valid.

b. The libel alleges that the appellant was "*compelled*" to pay and did pay the insurance moneys "*by reason of the assurance*" as to each shipment, and that the libellant be-

came *subrogated*, etc. (pp. 3, 4, 5). Therefore, it must be regarded that the insurances were valid, and that there was not even a defence as to any claim therefor. And none of these allegations as to the insurance is affirmatively denied in the answer. The answer merely put the libellant to the proof of those allegations (pp. 14–18, 25).

c. In the instruments made when the appellant paid the money to the shippers, it is stated that the property was "covered by insurance" with the appellant (pp. 39, 40). Therefore the insurances must be regarded as valid, and were so treated.

d. It is expressly found that the appellant "insured" the shippers that the shippers "abandoned said shipments to the libellant as a total loss," and that the libellant "paid said shippers the full amount of said insurances, as and for a constructive total loss" (pp. 34, 39, 40). To say that there was no insurance is, therefore, to go counter to the finding itself. Therefore, it must be concluded that these were valid insurances, and the moneys were paid as insurance moneys "as and for a constructive total loss."

e. The appellant in the libel in substance makes claim with respect to the proceeds of the remnants of the insured property (p. 5), and has obtained decree with respect thereto (p. 41). Therefore, the appellant must stand by its admissions, its allegations and its acts.

f. The instrument made by A. M. Wright & Co. (the shippers of more in value than five-sixths of the property shipped), in any view, could only work transfer or make assignment "To the extent of the interest" of the appellant "in said property" (p. 39). If the insurer was not liable as to this shipment, it could not then have had any interest in the property, and therefore claim as to that shipment would not, either by abandonment or otherwise, pass to the appellant (Post, Point Second, XI).

2. What then is the necessary and inevitable result? Unquestionably that it must be concluded that these were valid insurances and that the moneys were paid as such, and that if the appellee is entitled to the benefit thereof,

that right cannot be defeated by any claim (if it could in any such case be so defeated) that there was no liability on the part of the insurer, and that the moneys paid were not moneys to the benefit of which the appellee is entitled. If in any such case anything could invalidate the insurances, as for instance, a concealment of a material fact on the part of the insured, or some act on the part of the insured which might create a defence in an action brought on a policy, it must be conclusively inferred, that such fact, which, if concealed in another case might have invalidated a policy, was communicated or known to the insurer, or that the insurer received premium therefor, and that as to anything which might constitute a defence in another case, it would constitute no defence here. The property was insured (pp. 2, 3, 4, 39, 40), the appellant was "compelled" to pay the amounts it paid "by reason of the assurance" as to each shipment and claimed to be "subrogated," etc. (pp. 3, 4, 5). It took the instruments it took as an insurer, for the property was "covered by insurance" with the appellant (pp. 39, 40). It paid the money as and for a constructive total loss (p. 40). It commenced its action as an insurer, alleged its liability as such, paid the losses as such and has enforced claims with respect to the remnants of the insured property, and therefore as such (pp. 5, 41.) Such are the allegations of the appellant and such were its acts, and it must, therefore, be concluded that the insurances were valid and that there was no defence thereto. And if the insurance was not valid, or there was any defence to a claim therefor, the burden was on the appellant to show it, which it has not done (Post, Point Second, VI, VII, XIV).

V. It is presumed that it may be claimed—to come to the precise point in this respect—that by reason of the provision, the benefit of which the appellee claims, the insurances were invalidated and that, therefore, there was no insurance of which the appellee could have the benefit. As has been already seen that cannot be successfully done in this case. The appellant has so admitted the validity of the insurance, so paid the insurance moneys, so acted in the matter that it must stand by its position, and it will not be presumed, as fraud will not be presumed, that the shippers concealed any fact material to the risk (Post, Point Second, XIV); did not conceal this provision, if that

were a material fact, or that the insurer knew of the provision that was in the bills of lading if they were issued or would be if they were not, or charged premium with respect thereto, or that the provision was immaterial to the risk.

VI. To enable a claim to be made that the insurance was invalid, or that there was defence thereto, because it was claimed there was concealment of a material fact, or for any other reason, it should be alleged and proved, if it could be, and found that there was such a concealment, or such other reason; that such concealment or other reason was not known to the insurer, and that if concealment was alleged that the fact concealed was material to the *risk*, and that a reasonable underwriter, reasonably acting, would not have taken the risk, had it known the fact, at the premium charged, and that this was known to the insured. Nothing of that kind is alleged or found.

Ante, Point Second, IV.
Post, Point Second, VII, XIII, XIV, XVII, 1.

VII. But this was not such a material fact as to the *risk* as could invalidate the insurance, even if it had been concealed. At most it was nothing to affect the *risk*, nothing relating to the *subject of the insurance.*

The distinction is well considered in the opinion of the Master of the Rolls—the leading opinion in the case—in the very late case in the English Court of Appeal, of *Tate vs. Hyslop, E. L. R., 15 Q. B. D. 368.* In that case a contract had been made by the insured with a lighterman, by which the lighterman was not to be liable except for his own negligence. The existence of this contract was not communicated to the insurer. The insurer charged higher rates of premium for insurance of property carried under such contracts, and there was evidence to show that this fact was known to the insured or their brokers when they got the insurance. The jury, among other things, found that the existence of this fact was material to the risk, that is to say, that it was "a fact which a prudent "and experienced underwriter would have taken into con- "sideration in estimating the premium." There was judgment for the plaintiffs, which was afterwards set aside by the Divisional Court. The Master of the Rolls, in considering the case (the appeal of the plaintiffs was dismissed), employs this language:

"The fact which it is said ought to be disclosed was the "plaintiffs' arrangement with Hooper, which minimized "Hooper's liability in case of loss. The only effect of such "an arrangement on the underwriters would be that, assum- "ing a loss for which the underwriters would be liable on "the policy to pay the plaintiffs the sum assured, they would "not have the same valuable recourse over against the "lighterman as they otherwise would have had but for such "an arrangement. It is obvious, therefore, that it would "only affect the salvage which the underwriters might have, "and if the underwriters had not taken any steps in the "matter which had become known to the plaintiffs I should "have thought that the existence of that which would only "minimize the underwriter's right to salvage was not a "material fact. It would certainly have been immaterial to "the risk and, to my mind, immaterial to the insurance."

After mentioning some of the facts, the Master of the Rolls continues, speaking of the underwriters, as follows:

"Therefore, they resolved to have two rates of premium. "If they had kept this resolution in their own breasts it "would have had no effect upon the matter which is here in "question, as it would only have affected salvage, and would "not, therefore, have been material," etc.

The Master of the Rolls then proceeds to notice the two rates of premium, and that there was evidence that it was known to the insured or their brokers that there were two rates of premium, and it was material that the underwriters should know what was intended, etc., and that as there were to the knowledge of the insured different rates of premium, etc., that it seemed to the Master of the Rolls that it became, under those circumstances, a matter which a prudent and experienced underwriter would take into consideration in estimating the premium, etc.

The case is cited here to show the recognition, in the opinion of the Master of the Rolls, of the difference between something merely affecting the salvage and something which it appeared would influence the underwriters in fixing the rate of premium, and of course is different from this case. In that case the jury found that the undisclosed fact was material to the risk, and it affirmatively appeared that the existence of the contract was not disclosed to or known by the insurer, and it was affirmatively found that the undisclosed fact was one which a prudent and experienced underwriter would have taken into consideration in estimating the premium.

Nothing of the kind is found or alleged or appears in this case. On the contrary, the findings are entirely inconsistent with any such thing—with anything which would invalidate the insurance or constitute a defence to an action brought on either of the contracts of insurance (Ante, Point Second, IV), even if it was possible to raise any such question in this case, which it is not.

VIII. It is practically impossible that business should be done if anything qualifying the extreme liability of a common carrier would invalidate an insurance upon property shipped or to be shipped under a bill of lading. Thousands of shipments under bills of lading containing important qualifications of the liability of carriers are made in this country every day. It is believed that the contents of a bill of lading, under which such shipments are made or to be made, are not stated to the insurer in one case in an hundred thousand—practically are never specially made known to an insurer. Is it to be said that all such insurances are invalid or that good defence exists as to them, for the reason that the property is to be carried under bills of lading which qualify the liability of the common carrier and therefore lessen the remedy which the insurer in case of loss might have against him? Is it to be said, for instance, in the cases in which this Court has decided that a common carrier may limit his liability by reasonable provision, that if the fact that such provision had been made was not known and assented to by the insurer that insurance upon the property carried would be void? And such, if made, is the claim on the part of the appellant here, that this provision in the contracts of affreightment, by lessening the rights which the insurer otherwise would have had, invalidates the insurance or affords ground for a defence thereto.

It must be apparent (and courts will take judicial notice of the manner in which such business is done, Ante, Point First, VII) that nothing of the kind invalidates or constitutes a defence to the contract of insurance in such case—nothing of the kind in the absence of express agreement on the part of the assured to the contrary, and that the right of resort to such salvage as there may be is only as to the salvage as it may be, without restriction on the right of the insured—a restriction which would palsy such business if it existed—to make such contract as he pleases with the carrier of the property, without invalidating the insur-

ance or creating defence thereto, providing, of course, that such contracts are not void as against public policy, and providing also, of course, that the insured has not expressly agreed that some particular contract should not be made.

IX. In case the insured, whose property is to be carried, has made special contract with the insurer, that the insurer should be subrogated to all claims against the transporter of the property, that may make a difference. Should the insured do anything to defeat that right, where such express agreement had been made, he might, perhaps, be liable for the breach of this, as for the breach of any special agreement. But that is not the case here. There was no such agreement in the contract of insurance (pp. 34–38). That was the case, for instance, in *Carstairs vs. M. & T. I. Co. of N. Y., 18 Fed. Rep. 473.* In that case it was specially provided in the policy of insurance and the indorsement thereon that the insurer in case of loss was to be subrogated to all claims against the transporter of the property. The insured, in that case, made an agreement with the carrier of the property similar to the provision under consideration here, and the Court held, in substance, that the agreement with the carrier was binding, that the recourse of the insurer against the carrier was thereby defeated, and in substance that there was breach of the express provision in the policy of insurance, and indorsement thereon, which constituted a defence. *Carstairs vs. M. & T. I. Co. of N. Y., 18 Fed. R. 473*, then was not the parallel of this case in the fact that there, was in substance *express agreement that the insurer should have the cause of action of the insured against the carrier*, which was not the fact here, and besides that was an action between the insured and the insurer, where everything might be litigated, and not an action such as this, where the insurer has admitted and alleged, and the finding expressly finds its liability, where it claims, under instruments stating that the property was covered by insurance, and where the insurer, claiming in its libel to be subrogated, has obtained decree as it has here (Ante, Point Second, IV; Post, Point Second, XIV).

And it is of course to be observed that in both these cases, *Tate vs. Hyslop* and *Carstairs vs. M. & T. I. Co. of N. Y.*, that the agreement with the carrier discharged his liability—that the right of the insurer to enforce claim against the carrier was destroyed, and the actions against

the insurers were defeated because the carrier was exempted from liability to the insurers. If remedy against the carriers were not so defeated, of course the insurers' right of subrogation would have been unaffected, and it would not have been held, in either of these cases, that the insured could not recover (Post, Point Second, XIV).

The distinction between a case where there has been in substance an express agreement between an insurer and the insured, that the insurer's right of subrogation shall be unaffected, and one where no such agreement has been made (as was the fact in this case, pp. 34–38) is referred to and stated in the late case of *The Sidney, 23 Fed. R. 88, 90.* Part of the opinion in the case is as follows:

"The contract of insurance in this case, contains no "express provision for any subrogation of the insurers to "the rights of the assured on payment of the loss. In such "cases the right of subrogation, if any exists, being no part "of the contract, does not depend upon the contract or "on the form of it; it is a mere equity to be worked out "through the rights of the assured only in his relation to "other parties. If the assured has a legal right to indemnity "for the loss against a carrier, that has no legal or equitable "right to the benefit of the insurance, then the liability of "the carrier to the assured is regarded as the primary "liability for the loss, and the liability of the insurer as "secondary and similar to that of a surety only. The "insurer on payment, is therefore held, in such cases, to be "equitably entitled to stand in the shoes of the insured, "and to recover such indemnity as the insured was entitled "to recover against other persons having no right to the "benefit of the insurance." * * * * * * * * * *

"In this case there is no provision for subrogation in the "insurance contract; hence any right of subrogation here, "as previously stated, is a mere equitable right depending "upon the actual relation of the other parties to each other. "It is, therefore, subordinate to the equitable rights existing "between a principal and his agent, who effects the insur- "ance for the benefit of both, and upon the account and at "the primary charge of the principal."

And see Foster vs. Van Reed, 70 N. Y. 19.

X. Nor does it make any difference in this case (Ante, Point First, XX), if the bills of lading were made and received after the contracts of insurance were made, or that

the insurer never knew anything about the provision in the bills of lading. There was nothing in these contracts of insurance to prevent either transfer of the property insured or of the contracts of insurances themselves (pp. 34–38), and the validity of the insurances would be unaffected by transfer of the contracts of insurance, provided an insurable interest was retained in the property, and of course, therefore, the validity of these insurances was unaffected.

Post, Point Second, XVI, 1.

And so has the appellant really placed itself here, in taking the instruments it did—in its libel—in taking its decree, and such in substance is the finding in this case (Ante, Point Second, IV, 1, *d*).

It would make a revolution indeed in the business of banking in commercial centres, in which advances are made so largely on bills of lading and certificates of insurance, were this Court to decide that the certificates of insurance were invalid, or that there was defense thereto, if there was anything in the bills of lading under which the insured property was to be carried, which might affect a right or remedy of an insurer in case of loss and payment thereof, and which was not known to the insurer when the contract of insurance was made. If such were the law, how many millions of insurances have been invalid for a reason never suspected even by the insurers?

And for such reasons as are here indicated, was the distinction made in the opinion of the Master of the Rolls, in *Tate vs. Hyslop*, between something which may affect the salvage and something really relating to the risk itself (Ante, Point Second, VII).

XI. If it be claimed on the part of the appellant that it was not liable for the insurances, but that it took by assignment, as such, causes of action against the carrier, the answers thereto are obvious.

1. By its libel, by all its acts, by the finding in the case, by the provisions of the instruments under which it took whatever it did take, if it took anything, it appears that it acted, took, and brought this action as an insurer who had paid losses (Ante, Point Second, IV).

It cannot claim now that all it has done, all that has been found, rest on a wrong basis, that all is something else, that it was not an insurer or liable as such, that it paid no losses

and took no decree as such, that the finding in this respect is wrong. But if it were permitted to do all this, and all were as it would claim, if it was not an insurer, could it take by abandonment, which can only occur with respect to an insurer?

Wilson vs. Harper, 1 Comstock, 586.
Merc. M. I. Co. vs. Caleb, 20 N. Y. 173, 177.
Railroad Co. vs. Soutter, 13 Wallace, 577.
Hough vs. Ætna, etc., 57 Ill. 318.

It is (but see the case of *The Insurance Co. vs. The "C. D. Jr."*, 1 Woods, 72) claimed that it could not. But if it did take by abandonment, it, of course, so took subject to the rights of the carrier (Ante, Point Second, III).

2. Nor could it take by mere assignment, which would be the case if it took anything and was not an insurer or liable upon its contracts of insurance. It was an insurance company (p. 33). If, when it paid its money, it merely bought this lawsuit, this Court will not presume that it had power to do so.

3. But if it was not an insurer and did not take as such, if it took anything, it did not take anything with respect to the shipment of A. M. Wright & Co., for the instrument given by the firm of A. M. Wright & Co. was so limited as to pass nothing except to the extent of the interest of the appellant, and it would have no interest save as insurer, no interest save such as insurance, abandonment and acceptance, or payment, would give it. And the shipment of A. M. Wright & Co. was in amount more than five-sixths of the whole (pp. 33, 34).

XII. But if it took anything, and it probably did take rights as to the remnants of the property, either as abandonee or transferee, it took no cause of action against the carrier for injury to the property by the stranding. In either case it only took such rights as the insured would have, if any, after the payment of the insurance money to them. The abandonment could create no cause of action, and had no such relation back as to create any such cause—no effect as to the carrier (Ante, Point Second, III). Nor had any assignment, if any there was, any such effect. When the moneys were paid to the insured, it being insurance moneys

(Ante, Point Second, IV) to the benefit of which the carrier was entitled, the claims against the carrier were extinguished, and there was nothing in this respect to pass by abandonment or assignment. It would be a strange thing, indeed, if the payment to the shippers of money the benefit of which they had contracted the carriers should have, could create a cause of action against the carrier in favor of a party with which it was in no such privity and to which it owed no obligation or duty, which would create such liability (Ante, Point Second, I). And beside the instruments were, of course, subject to the rights of the carrier, and affirmed the bills of lading, and only assumed to "assign, transfer, cede and abandon" the "right, title and interest" of the respective parties making them, with the express limitation in the one made by A. M. Wright & Co. (Ante, Point First, XXI; Ante, Point Second, III).

XIII. And it is to be remembered that when the payment of the insurance moneys, as such, was made upon the liability of the insurer, as such (Ante, Point Second, IV), the insurer knew or was chargeable with knowledge of the contents of the bills of lading, that those bills of lading were then recognized and affirmed by the shippers, and the insurer paid what it did and took what it did take, if it took anything, with reference thereto and subject thereto (Ante, Point First, XIX, XX, XXI).

Is the insurer to be permitted to repudiate everything now—the knowledge which it had or was chargeable with, all it has alleged and all its acts in this respect, the instruments under which it took, if it took anything, the character in which it took decree in the case and the finding in the case, and in the absence of any allegation or finding of fraud or mistake, to maintain this action against a party in no privity with it and owing it no obligation which would enable it to maintain this action—a party against whom the insured could not have maintained action after payment of the insurance moneys (Ante, Point Second, I)?

It is most respectfully, most confidently, claimed that such will not be the result here.

And that it will not, is recognized in the case of *The Sidney, 23 Fed. R., 88, 96*, already referred to. In that case there was an exception as to "want of ordinary care and skill in lading or navigating said boats," which is not in the policy here. In that case part of the opinion is as follows:

"But here the carrier, as I find upon the facts, is not a "mere stranger to the insurance. He is equitably entitled "to the benefits of the policy, and hence entitled by an "equity paramount to that of the insurers, and as against "Morse & Co. or their indorsees, to have any moneys paid "on account of the loss to either of them applied in discharge "of his own obligation. Any voluntary settlement made by "the insurers with either inures to his benefit as much as to "theirs.

"A voluntary settlement and payment are in general "binding and cannot be ripped up and set aside except upon "some of the special and recognized legal grounds therefor, "such as duress, fraud or mistake of fact. *2 Greenl. Ev., secs. "85, 120–123; Elliott vs. Swartwout, 10 Pet. 137, 154; Nichols "vs. U. S., 7 Wall, 128.* This rule applies not only to the "immediate parties to the settlement, but in favor of others "also that are in privity with them. The carrier here being "equitably entitled to the benefits of the policy is clearly in "privity with Morse & Co., the assured, and their indorsees. "A settlement by the insurers with either, inures directly to "the benefit of all. It is as binding as respects all, as re-"spects either, and it cannot be set aside as against either, "except upon some of the special grounds above referred to. "Upon either of these grounds it might be set aside, doubt-"less, in an action against the carrier, but then only upon "appropriate averments in the libel and upon appropriate "proof. And in such a case the whole burden of proof is "upon the libelants. 'It is incumbent upon them,' say the "Court in the analogous case of *Hooper vs. Robinson (98 U. "S. 540)*, 'to establish everything necessary to entitle them "to recover, and they have no right to throw upon the "defendant any part of the burden that belonged to them-"selves. See also *Transportation Co. vs. Downer, 11 Wall. "129, 134.*

"If the proofs had shown, therefore, that this loss occurred "by such negligence as rendered the insurers not liable upon "their policy, and that the insurers had settled with and "paid the owners upon a clear mistake of the facts in regard "to their liability, I should hold that the libelants would be "entitled to maintain an action against the carrier under an "appropriate libel for that purpose. But this is not a libel "of that character. No mistake or misapprehension of any of "the facts at the time of settlement and payment is alleged "in the libel or suggested in the proofs, and as to the alleged

"negligence no evidence has been given by either party. "The libel charges negligence, the answer denies it and "states that the stranding occurred under such circumstances "as negative the charge. These averments of the answer "must be taken as a whole. The libelants having once paid "the loss as a loss covered by the policy, if they sought to "recover back the amount paid in an action against a carrier "equitably entitled to the benefit of the policy, on the "ground that the loss was within one of the exceptions of "the policy, and was paid under a mistake of fact, must sus- "tain the entire burden of proof, and affirmatively show "both their ignorance and mistake as to the facts, and that "the loss was actually within the exceptions of the policy."

In the case of *The Sidney*, as has been said, the policy excepted "want of ordinary care and skill in lading or navigating said boats," and some of the language of the Court applies to any claim to be made by the insurer, with respect to that provision. Here the claim if made is that the insurance is invalidated, by reason of the provision as to insurance, and here there is neither allegation or proof of mistake or fraud, and, on the contrary, the insurance was regarded and acted upon as and found to be valid (Ante, Point Second, IV). The language of the opinion in the case of *The Sidney* is, therefore, applicable to this case in this respect.

XIV. Beneath the provision of the bills of lading, with respect to insurance, in any view, this action cannot be maintained.

1. This appears from the following cases:

Merc. Mut. Ins. Co. vs. Calebs, 20 N. Y. 173.
Carstairs and others vs. The M. & T. Co., etc., 18 Fed. R. 473.
Rintoul vs. The N. Y. C., etc., 21 Blatchford, 439.
The Sidney, 23 Fed. R. 88.
Home Ins. Co. vs. The Western Trans. Co., 33 Howard's Pr. R. 102, 108.

Nor are all of these, cases in which the loss happened without negligence.

And the doctrine has been approved by this Court in *Hall & Long vs. Railroad Companies, 13 Wallace, 367, 371,* in which this language is employed, in referring to the

question whether or not the doctrine of subrogation applies to cases of fire as well as to cases of marine insurance: "Nor do the authorities make any distinction between the "cases, though a carrier may by stipulation with the owner "of the goods obtain the benefit of insurance."

The case of *The Hadji, 20 Fed. R. 875, 877, 16 Fed. R. 861,* recognizes the same doctrine.

And see the opinion in the District Court in this case,

Phœnix Ins. Co. vs. E. & W. T. Co., 10 Bissell, 18.

And see also

2 Parsons on M. Ins., 492, 496.

2. That the carrier must be regarded as having in effect paid the premiums for the insurance has already been said (Ante, Point First, XV, XXI). In other cases dependent upon similar principle—the familiar instance where a mortgagee has obtained insurance really for the benefit of the mortgagor and where, as here, there was no special agreement in the contracts of insurance that the insurer should be subrogated—where the insurer claimed subrogation by operation of law—in such cases it has been held that the insurer took no interest in the mortgage debt, and this where the insurer was ignorant as to the real state of the matter as between mortgagor and mortgagee.

Kernochan vs. The N. Y., etc., 17 N. Y. 428.
The Sidney, 23 Fed. R. 88, 94.
Waring vs. Loder, 53 N. Y. 581.
Halbrook vs. The Am. I. Co., 1 Curtis, 193, 199, 200.
Clinton vs. The Hope I. Co., 45 N. Y. 454, 467.

3. The case of *Cin., Ham., etc., vs. Spratt, 2 Duval, 4,* it is supposed, will be referred to on the part of the appellant. It does not hold that such a clause as this is ineffectual. The opinion, in reference to the clause in that case, employs the following language:

"Wherefore, the second paragraph in the answer was "insufficient and the appellants were properly remitted to "their independent action in which it might be decided "whether any agreement between carrier and the assured "can make the underwriter liable to the carrier."

XV. The opinion in the case of *Hall & Long vs. Railroad Companies, 13 Wallace, 363,* which was a case in which the doctrine of subrogation as applied to fire insurance cases was considered, employs language which, if

true, in many applications (and of course this is most respectfully said), is not applicable to such a special case as this—which, if true, in application to a case of ordinary subrogation, does not settle any principle which should affect a special case like this. In the language so employed it is stated in substance that the liability to the owner for the destruction of property is, in effect, primarily upon the carrier, while the liability of the insurer is only secondary. That may be so, in effect, when the insurer is entitled to subrogation. But if the insurer does not take by subrogation, how can there be degree of liability to the shipper, or, rather, is not the insurer then primarily liable, if the carrier is to have the benefit of the insurance? And if a shipper can and has made a contract with a carrier which has, in effect, prevented the insurer from taking what it claims, how can it be said that the owner and the insurer are considered as one, having together the beneficial right to indemnity from the carrier—how can this be said if the shipper has made an effectual contract (and that is the question) that such shall not be the case? How can it be said that an insurer stands in the position of a surety in such a case as this? A surety for whom? Not for the carrier, for the insurer cannot resort to the carrier for indemnity, is in no privity with the carrier which would enable it to do so. How can it be said that in such a case as this, the claim of the insurer rests upon familiar principles of equity? Were this provision not in these bills of lading then such *illustration* might perhaps apply. But here, if this provision is effectual, if the carrier is entitled to the benefit of it, it would be inequitable—it would be injustice, to deprive it of that benefit. And all this is said because, perhaps, a more striking instance does not exist, of the employment of general language, which, if employed without exception as to special cases, would work out a result never intended to be within its meaning.

XVI. Nor is it against public policy or unreasonable that the appellee should have the benefit of this insurance.

1. It is at the very outset of this consideration to be remembered that this particular provision is not a provision or contract lessening the obligation of the carrier to carry and deliver—or lessening the security or remedy of the

shippers (Ante, Point First, XIII). Yet the right of the carrier under the clause is protected and perfect. It is really of but little practical use, save for the purpose of possible illustration, to consider what would be the result were the facts different—had the appellant, for instance, not paid the insurance moneys as it did, and in discharge of the claims against the carrier (Ante, Point Second, III). But suppose it had not done so, and the carrier had satisfied the claims of the shippers, voluntarily, or after actions brought against it. In such case, as there was no provision in the contracts of insurance preventing any transfer or assignment of the property insured or the contracts of insurance (pp. 35–38), the carrier could, in any view, have enforced the contracts of insurance against the insurer, as any other assignee or equitable or other owner thereof might have done, or as if the losses had, by provisions in the contracts of insurance, been made payable to the carrier. The interests of the shippers would sustain the insurances, or if it should be necessary that the carrier should have an interest, it had an insurable interest as to the property equal to its full amount (Post, Point Second, XVII), and if the carrier and its interest were also insured, of course it would be entitled to the benefit of the insurances, and could sustain action in its own name therefor (Post, Point Second, XVIII). Hundreds of thousands of policies of insurance are held throughout the country under assignment, when no interest of the assignee—when only the interest of the assignor is insured—as, for instance, where a policy of insurance made to the owner and insuring his interest, is assigned as a collateral security for the purchase money of lands and buildings thereupon. And is it to be said that such policies cannot be enforced? And the right on the part of the appellee to have the benefit of this insurance is, in substance, at least as good as the right of any assignee or equitable owner of a policy—the same, for there was nothing to prevent the appellee from having that right, and the agreement that it should have it was effectual. Suppose the shippers had assigned these contracts of insurance to the carrier. The carrier could have enforced them. With equal certainty can it have the benefit of them now?

1 Parsons on M. Ins., 52–63.
1 Phillips on Ins., secs. 91, 80, 85, 286.
Woods on Fire Ins., 575, 581.
Earl vs. Shaw, 1 John. Cases, 314.

Cornwell vs. The B. F. I. Co., 44 N. Y. 42.
Greene vs. Republic F. I. Co., 84 N. Y. 572.
Griffey vs. N. Y. C. I. Co., 30 Hun, 299.

This is not a case like *The Atlantic, etc., vs. Storrow, 5 Paige, 285*, or such as is referred to in *The Atlas, 93 U. S. 302, 310*, where the carrier was not entitled to the benefit of the insurance. Here the carrier is entitled to that benefit, and there was at the time of the damage to the grain insurable interest to support the insurance. Nor is this a case where question is made as to the right of the legal or equitable owner of any insurance—of the right to recover it—to bring action in his own name (Ante, Point Second, I) as are some cases where that question—that technical question—is a question.

This also must be plain: That where, as here, there is no limitation on the right to transfer property or policy, and no agreement that the insurer shall by subrogation take anything, then that the insurer has charged premium sufficient to compensate it, with reference to transfer of property or policy, or such a provision as was here made.

But even if this were not so—if from some technical or other reason the carrier could not maintain such action in its own name, or in the name of the shippers for its benefit, what would be the result? The insurer, if it did not pay, would not have fulfilled its contracts—would not have indemnified the shippers for their losses, as it agreed to do and had received premiums for its agreements to do. The doctrine of equity would in such case apply. While the security and ultimate remedy of the shippers against the carrier would be in no sense weakened, they could be compelled to resort, in the first instance, to the insurer (for in the bills of lading it was agreed that the carrier should have the benefit of the insurances), and should they not receive satisfaction from that source, their remedy would be still perfect against the carrier. It would be but the application of the equitable doctrine, that where one party may have remedy against another, to the benefit of which a third party is entitled, though he may not be able to pursue it, that that third party may compel resort, or defend if it is not had on proper request and indemnity as to the expenses of the action, to the remedy, to the benefit of which he is entitled.

Willard's Eq. Juris., 108, 531.
2 Story's Eq. Juris., secs. 633, 645.

Wright vs. Simpson, 6 Vesey Jr. 714, 734.
King vs. Baldwin, 2 John. Ch. R. 562; 17 Wendell, 384.
Warren vs. Beardsley, 8 Wendell, 194.
Kellogg vs. Rand, 11 Paige, 59.
Wright vs. Austin, 56 Barbour, 13.

And in case such action were brought by the shippers against the insurer, the insurer could not defend on the ground that the shippers could have ultimate remedy against the carrier. Nor could it compel the shippers to resort in the first instance to the carrier, for the carrier is entitled to the benefit of the insurances.

The consideration of the matter in any aspect, reaches the determining conclusion that the carrier is entitled to the benefit of these insurances, and certainly the law will afford means that it shall have that benefit.

And, beside, the insurer has paid the insurance moneys, and can it now recover against the carrier? Can it do so under all the effects of such payment (Ante, Point Second, III, XIII)? These are the questions in this respect. And considering them in any aspect, it must be apparent that the insurer cannot so recover.

2. If the provision is invalid as against public policy it must be for the reason that it is against public policy, not that the shippers should not lose protection, for they lose none, but that a common carrier—a ship owner—shall not be permitted to do anything which shall lessen his loss, although the shipper does not suffer—that such contract is evil and against public policy. To such extent does the contention, if made, on the part of the appellant go. It is believed that not a case can be found in the books which goes to any such extent or establishes any such doctrine, while many so rest upon opposite doctrine, that should the ground urged upon the part of the appellant in this respect prevail in this Court, it would result in the overthrow of cases and principles as well founded as any in the law-merchant, to virtual revolution in many branches of business, if business of the greatest public importance would or could be done beneath such rule (Post, Point Second, XVII). The leading and very important case of *Railroad Company vs. Lockwood, 17 Wallace, 357*, which virtually settled the law, as held by this Court, on the subject of the power of common carriers

to contract for exemption from liability for the negligence of servants, is understood to proceed upon no such ground —especially as it is considered in connection with other cases about to be cited—but to proceed upon the ground that it is the shipper who is to be protected—that those who ship should not be bound by unreasonable provisions prejudicial to their interests, and so prejudicial that the interests of commerce might suffer by being incumbered by the imposition of unreasonable conditions (see pp. 377–382 of the opinion in the case). If the claim on the part of the appellant be that such provision is against public policy because it is claimed that thereby the security of the property of others than the shipper would be lessened—that more property would be stranded, or burnt, for instance, were such provision permitted—then the reply is, that it is believed that not a case can be found—not a principle applied—which will sustain such claim. The very opposite appears in many a case—in principles which keep the parts of the law-merchant in accord (Post, Point Second, XVII). And if the claim on the part of the appellant cannot be upheld to this extent, then it is no claim at all, for, as has been said, the shippers lose no security by this provision. An insurer may lose, but where can it be found that it is a part of the law respecting common carriers, that an insurer, paid for taking the risk taken, shall be entitled to any especial protection or privilege?

That the policy in such cases is, in substance, as is here claimed is apparent from other cases. In the opinion in

York Company vs. Central Railroad, 3 Wallace, 107, 112,

the following language is employed:

"Nor do we perceive any good reason on principle why "parties should not be permitted to contract for a limited "responsibility. The transaction concerns them only; it "involves simply rights of property; and the public can "have no interest in requiring the responsibility of insur- "ance to accompany the service of transportation in face of "a special agreement for its relinquishment."

And see

Bank of Kentucky vs. Adams Ex. Co., 93 U. S. 174, 183–185.

Hart vs. Pennsylvania Railroad Company, 112 U. S. 331.

Express Company vs. Caldwell, 21 Wallace, 264.

3. Such, notwithstanding casual expressions which may have been employed in other cases, being the principle in this respect—and were another principle such as it is supposed will be contended for on the part of the appellant to prevail, might lead to strange overthrow and confusion (Post, Point Second, XVII)—such being the principle in this respect, that the shippers should be protected and that commerce shall not be improperly burdened by unreasonable impositions upon them, as this provision in no manner weakened the security of the shippers, it may be useless to give further consideration to the question here, in any general aspect.

There is another aspect of this question, as to public policy, and as to the exclusion of contracts for exemption of carriers from liability for the negligence of employees. The very important case of *Railroad Company vs. Lockwood, 17 Wallace, 357*, and subsequent cases giving the doctrine there established wider application, are with respect to the contracts or duties of railroad companies. They are based, at least, largely upon the manner in which such business is done—upon the consideration that the person to be carried or the shipper of property, does not stand on an equality with the carrier—that such carriers hold in substantial monopoly the means of such carriage—upon these and kindred considerations. Such is not the case with respect to maritime bills of lading; and settled as character of these waters is by the cases of *Moore, et al., vs. American Transportation Co., 24 Howard, 1, and The Eagle, 8 Wallace, 15*, these must, of course, be considered, at least in legal substance, as maritime bills. No monopoly controls the sea—none the western lakes. Shippers, upon the sea-board or upon the lake-board, of such property as was shipped in this case, stand upon an equality with carriers. Bills of lading are or can be as deliberately made as any other commercial contracts. The fundamental grounds, then, upon which the doctrine of this Court, with respect to such exemption, in some measure at least rests, may well not extend to such bills of lading.

Would it not be for the very protection of the shipper that the doctrine should not have such extent with respect to contracts so made—with such opportunity for deliberation in their making—such freedom of choice as to the carrier? For it is to be remembered that extent of liability leads to increase of freight and that it is upon the shipper

that the weight after all falls. Is it public policy that a shipper of a cargo by sea, must pay the greater freight which he must pay, if he cannot contract for a lesser liability—cannot make such contracts as these? And if it should be held here, that this doctrine applicable to a contract substantially for land transportation, should not apply to such bills of lading, would not the doctrine of this Court in that respect be brought into accord with the conveniences of business, and with the law-merchant?

Graves vs. Lake Shore, etc., 137 Mass. 33, 34.

Other general considerations as to the business of the appellee show that it should have the benefit of the provision. A common carrier is not an insurer, as he is frequently called (*Hall & Long vs. Railroad Companies, 13 Wallace, 367, 372*). As such, he is a bailee of property, placed under extraordinary responsibility. When he obtains insurance on property he carries, he obtains such insurance as bailee, and this he may do without specifying the particular character of his interest (*1 Phillips on Ins. sec. 424*; *1 Arnould on Ins. *227, 228*), and to the extent of any liability under which he may come. And he will have such protection, although the peril by which the loss be caused, if the carriage is performed by a vessel, arises from the negligence of officers or crew (Post, Point Second, XVII).

Is it to be said at this day, that all that has permitted this for ages, is to be finally overthrown, that all such insurances are, to such extent, to be illegal—that henceforth, neither ship owner, or inn-keeper, or ferryman, or warehouseman shall be permitted to so insure that they may have protection against loss arising from a cause attributable to the antecedent negligence of officers or crews of vessels, or servants (Post, Point Second XVII)? And if such principle must now come for the first time into the body of the law, must it be carried still further, and a contract contemplating even a possibility of such protection (for the shippers were not bound to insure in this case) be also ineffectual?

It has never been the theory of the law or the policy of commercial communities that ship owners should not have protection. Out of the policy that they should have protection, sprang the laws, the rules, the ordinances of the days when the foundations of commercial law were established—the statutes of later years limiting the liability

of ship owners—all which, from an immemorial time, and for the building up of commerce, has limited such liability (*Moore, et al., vs. American Transportation Company, 24 Howard, 1*). Such policy which invites capital and the enterprise of responsible men into such business will do a thousand times more to further every public interest thereby to be affected—more for the security of life and property—than any narrow rule which, it might be supposed, would spur an officer of a vessel, for instance, with position, reputation and life at risk, to greater vigilance, because there might be a possibility that the owner of the vessel might have the benefit of insurance on part or all of a cargo. And it is to be remembered that a leading feature of the law exempting a ship owner from liability in some cases, or limiting such liability in others, is that he shall be in no personal fault. So here the appellee was in no privity with the cause of this loss—not even with the antecedent negligence (p. 39).

Forbid ship owners from being insured, make their liability unlimited, and—even if such business would be done at all—more would be done to lessen the security of life and property (it does not appear that the Merchant carried passengers, nor would the principles applicable to this case be different if she had) than in any other way. Common carriers by land and by water have been of incalculable benefit to this country, in its development, in its enrichment, in destroying its distances, in compacting it together. No system of jurisprudence should regard harshly such a carrier as this appellee, engaged in the business which forms the great practical feature of the time. If it were not for common carriers, the City of Chicago would not exist, and the State of Illinois would be little more than a hunting ground.

And in this connection, and in another view, it is apparent how accurately the recognized principles of the law-merchant protect shipper and insurer in such cases. If a ship be unseaworthy at the commencement of the voyage, and loss happens thereby, if the ship owner be thus in privity with the cause of loss, then it is elementary law that, in the absence of special contract in that respect, because of the implied warranty of seaworthiness in such cases, an insurer would not be liable for a loss so happening, and that the ship owner would be liable therefor. And the warranty as to seaworthiness, when it applies, includes warranty as to the competency and sufficiency of officers and

crew. There was no provision in these bills of lading exempting the appellee from any liability arising out of any implied warranty of seaworthiness. With a seaworthy vessel, with competent and sufficient crew—that is, with liability if the vessel was not so seaworthy—with no insurance, no liability on the part of an insurer if she was not so seaworthy, and with liability for the negligence of officers and crew, is there not enough to meet the demands of public policy, even if a ship owner should hold insurance of vessel, cargo or freight?

Is it to be said that public policy requires that an altogether innocent ship owner shall not be permitted to insure or even to have the benefit of an insurance possibly made, but which he has not made it a provision of a bill of lading should be made?

But really there is no such question of public policy in the matter. The only consideration, in this respect, is as to what shall reasonably protect shippers and prevent commerce from being burdened with unreasonable provisions as to them.

And can it harm the shipper or burden commerce that a carrier should have the benefit of any insurance there might be upon the cargo when the security of the shipper is not weakened thereby? But were the question of public policy not what it is really, and practically to illustrate any other idea by the facts in this case: When this propeller "in a dense fog," one of the greatest, if not the greatest, perils of navigation, "was stranded on the western shore of Lake Michigan" (p. 39), is it to be supposed that the master of the vessel, for instance, with position, reputation and, perhaps, life at risk, to say nothing of his personal responsibility, was less vigilant in the slightest degree, because—even if he happened to know it—it was provided in these bills of lading, or in the bills of lading of the whole cargo, if there were such bills as to the rest, that the appellee might have the benefit of insurance thereon, if any such insurance there was? Is the law as to many kinds of insurance, direct and absolute as to these, and, in legal principle, similar instances, and covering the liabilities of bailee, of carrier, of innkeeper, of ferryman and, perhaps, warehousemen, to be overthrown, by such claim as it is assumed will be here made, in this respect, as to this provision? Does not such claim seek, at least, to attenuate theory into impracticable thinness?

3. Of course, the insurances here were not upon the interest of the appellee, unless, indeed, the interest of the appellee were really insured under the language of the policy "on account of whom it may concern" (p. 35, Post, Point Second, XVIII). The interests of the shippers were insured, and the appellee, in the event of its liability, was to have the benefit of such insurance. But it is understood to be claimed on the part of the appellant, that as this Court has held that a common carrier cannot exempt himself from liability for the negligence of his servants, that therefore he cannot have the benefit of insurance effected as this was, because it would be against public policy that he should. Therefore, the foregoing general considerations have been deemed apposite to the case. And the views here urged upon the part of the appellee in these respects will be strengthened by further considerations (Post, Point Second, XVII).

4. Nor is there any case which establishes a contrary doctrine. It has been said that a seaman cannot insure his wages. Whatever there may be of law in this respect, and if such be the law, it arises from the peculiar character of such men, and only where the insurance is directly upon his future wages.

1 Arnould on Ins., **208.*

A seaman may insure property which he owns, and which is carried upon the vessel upon which he is employed; and a master may insure any interest he has in the cargo.

1 Arnould on Ins., **208.*
1 Phillips on Ins., secs. 212, 213.

And it is incontestable that a ship owner, a common carrier, may insure ship, cargo, and covering his liability as a common carrier, and freight dependent upon its being earned upon the arrival and delivery of the cargo.

Post, Point Second, XVII.

XVII. Upon principle and authority it appears that it can make no difference in this case, that the vessel was stranded "through the negligence of those engaged in managing the propeller" (p. 39).

1. The appellee could legally have obtained direct insurance upon the property which would have covered its liability in this case, and without specification of the character in which it was insured—obtained it as any other bailee might obtain insurance (*1 Phillips on Ins., sec. 424; 1 Arnould on Ins., *227, 228, 225*), and if loss should happen by a peril insured against, as, for instance, stranding, it would be no defence to the claim that the peril arose through the negligence of those engaged in the navigation of the vessel. It is the peril that is insured against, and that negligence preceded the peril does not defeat claim for the insurance. And the rule is the same, in substance, in cases of fire insurance (*1 Phillips on Ins., sec. 1096*). All this is of course elementary law, nor does it need quotation of the maxim *causa proxima*, etc., or reference to the well-known language which so well expresses the infinite inquiry were the causes of a cause to be sought or given significance, to establish this. The losses were by stranding in a "dense fog" (p. 39), and of course by a peril or perils insured against.

1 Parsons on M. Ins., 546.
*2 Arnould on Ins., *796, 799.*

2. All this appears by direct authority. Of course if the vessel were unseaworthy, or if there were provision—not in this policy (pp. 35–38)—that the insurer should not be liable for want of ordinary care and skill in navigation, as is in substance sometimes provided in policies (*Savage vs. The C. E. F. and I. N. I. Co., 4 Bosworth, 1, 36 N. Y. 655; The Sidney, 23 Fed. R. 88*), the rule might be different. But where a common carrier is insured, as is above supposed, then where the loss happens from a peril insured against, it is not a defence that negligence to which such peril might be attributed, preceded it.

1 Parsons on M. I., 167, 200, 549.
1 Phillips on Ins., sec. 1049.
Waters vs. The M. L. I. Co., 11 Peters, 213.
Williams vs. The Suffolk I. Co., 3 Sumner, 270, 276.
Hale vs. Washington, 2 Story, 176, 184.
Enterprize Ins. Co. vs. Parisot, 35 Ohio St., 35.
Copeland vs. N. E. M. I. Co., 2 Metcalfe, 432, 440–452.
Walker vs. Maitland, 5 Barn. and Ald. 171.
The Hadji, 20 Fed. R. 875, 877.

3. To hold that a ship owner, a common carrier, could not get ship, cargo, or his freight insured and thus to cover his whole interest as to either, and his liability for any damage to or loss of the cargo, or that in case of such insurance and a loss happening by a peril insured against, it would be a defence to show that that peril was attributable to or was encountered by reason of negligence on the part of officers or crew, would be to destroy doctrines thoroughly established in the law-merchant, and to introduce rules of widely injurious result and contrary to those under which business is done.

4. The general doctrine in this respect is well stated by Shaw, C. J., in language singularly applicable to this case.

Copeland vs. New England M. I. Co., 2 Metcalfe, 432.

"Suppose a case of a loss by stranding, and it could be "satisfactorily proved that if, in a particular emergency sail "had been made or taken in, if an anchor had been carried "out or the vessel put on another tack the disaster might "have been avoided; it would indicate a similar mistake of "judgment or neglect of duty on the part of the command- "ing officer as that in the case supposed. In both cases it "is a mistake or neglect of his peculiar and appropriate "duty as an officer and seaman. For the performance of "these duties we are of opinion that the owners, as "between themselves and the underwriters, are not respon- "sible. A contrary doctrine would lead to questions of "great difficulty, involving numerous questions of fact of "very difficult proof as to the skill and seamanship of all "the nautical measures taking in the whole conduct of the "voyage. Besides these mistakes of judgment and in- "stances of negligence are incident to navigation and con- "stitute a part of the perils that attend it; and they can no "more be restrained, prevented or guarded against by the "owners than by the underwriters. The most cautious "foresight can only enable owners to provide a competent "crew of officers and seamen at the commencement of the "voyage. What reasons then are there of justice or policy, "what considerations growing out of the nature of this "contract, or the relations of the parties which should pre- "vent the owners from insuring themselves against this "peril?"

5. Nor are such cases as *General M. I. Co. vs. Sherwood, 14 Howard, 351*, and *Matthews vs. The Howard Ins. Co., 1 Kernan, 9*, for instance, any exception to the rule. In those cases the question was not as to damage caused to property insured by a peril of the sea or lakes. Liens arose by reason of the negligence of those navigating the vessels and the law applicable thereto. These cases in substance recognize the doctrine, that where damage has been caused by a peril insured against, the insurer is liable, although the peril was brought about by negligence—recognize the doctrine, that when the proximate cause is a peril insured against, then the insurer is liable, and only hold in this respect, that where no damage has been caused to the insured property by a peril insured against, the insurer is not liable, and that the insurer under ordinary policies, in this respect, ~~do~~ does not insure against negligence which may be ground for creating a lien on the insured property. And the language employed in the case of *Matthews vs. The Howard Ins. Co., 1 Kernan, 9, 16*, for instance, as to sound policy, etc., does not relate to the ordinary cases of the insurance of a vessel owner—a common carrier—insurance covering vessel or cargo or freight and to loss happening from a peril insured against.

6. But even in cases where negligence has been in substance or directly insured against, such insurance has not been held to be invalid as being against public policy or on any other ground. In Massachusetts it is held that under an ordinary policy of insurance upon a vessel, the insurer is liable to the extent of a lien arising thereupon through a collision happening from the negligence of those navigating the vessel—not alone for the damage to the vessel, but to the extent of the lien arising thereupon on account of damage done by the collision to the other colliding vessel.

Blanchard vs. Equitable I. Co., 12 Allen, 386.
Walker vs. Boston Ins. Co., 14 Gray, 288.

And in England (and it may be in this country) the "running down clause," as it is called, having reference to such loss, and the lien arising upon a vessel by reason of collision, it is believed has not been claimed to be against public policy.

Xenos vs. Fox, E. L. R., 3 C. P. 630, 4 C. P. 665.

7. That such insurance can be legally obtained by a ship owner, a common carrier, which shall cover his whole liability, though the cause of loss be attributable to the negligence of his employees—which shall cover his interest in the vessel—which shall cover freight to be earned by the carriage and delivery of the cargo—must show that no objection to this clause, which does not make it obligatory upon a shipper to obtain insurance but only gives the carrier the benefit thereof as it does, if obtained—that no objection to the clause on the ground that it is against public policy, can be sustained (Ante, Point Second, XVI).

8. But of what insurance was the carrier to have the benefit? Is there any doubt that the shippers were insured in this case (Ante, Point Second)? And can there be any possible doubt that the moneys paid to the shippers were insurance moneys paid as for constructive total losses upon insurances made to the shippers (Ante, Point Second IV)? And these were the insurances upon which the moneys were paid—insurances upon the interests of the shippers—these were the insurances of which the carrier was to have the benefit. Must not the insurances have been the same as to any who should have the benefit thereof, as to the shippers themselves? How can it be successfully claimed that the carrier should not have the benefit thereof in any such case as this?

XVIII. But there is another aspect of this case under which it may be said the appellee is entitled, to the benefit of these insurances.

The policy provided as to the insurance of "Charles E. Chase, on account of whom it may concern, in case of loss to be paid —— in funds current in the City of New York, to him or to his order," and, in substance, that the appellant did "make insurance and cause —— to be insured, lost or not lost, * * * on cargo, premiums to be settled monthly, upon all kinds of lawful goods and merchandise laden or to be laden on board," etc. (p. 35). The policy further provided: "And in case of loss, such loss to be paid in thirty days after proof of loss, and proof of interest in the said ——," etc. (p. 36), and the several "shipments were duly approved and endorsed on said policy" (p. 39). Taking into consideration these provisions of the policy, the provisions of the certificates (pp. 34, 35), and the provision of the bills of

lading, with respect to insurance (p. 28), may it not be said that the carrier was also insured under these insurances? To enable it to be so insured it was only necessary that it should be within the intent of the shippers that it should be, and it was agreed between the shippers and the carrier that the carrier should have the full benefit of insurance (p. 28). It was not necessary that the insurer should know that the carrier should be insured, or have the benefit thereof, to enable it to be insured or have the benefit of the insurance. The adoption of the policy in such a case, may be sufficient to make it inure to the benefit of the party claiming such benefit. May it not be said, therefore, that this was an insurance so concerning the carrier, that in this view, if there were none other, the carrier would be entitled to the benefit of the insurance? And may this not especially be said when upon the appellant rests such burden as does rest upon it after payment of the insurance moneys? (Ante, Point Second, XIII.)

Hooper vs. Robinson, 98 U. S. 528, 536, 537.
1 Philips on Ins., secs. 383, 384, 388, 389.

And see,

The Sidney, 23 Fed. R., 88, 92, 93.

In the case of *The Sidney* the provision with respect to the indorsement on the policy, etc., was different from the provision in that respect in this case (p. 38).

All this may be of little consequence, when it so plainly appears that the appellee is, under other views, entitled to the benefit of these insurances, whether or not the view last indicated, and submitted to this Court, be tenable.

Upon authority, and beneath principles which sustain and promote commerce and are for the public good—upon these and for the other reasons hereinbefore urged—it is most respectfully and confidently claimed that the appellant should not have recovered in this action, as it did not, for damage to the grain or for the grain pumped or thrown overboard.

GEORGE B. HIBBARD,
For the Appellee,
Buffalo, N. Y.

117-312

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JAN 15 1886
JAMES H. McKENNEY,
CLERK.

[NOTE. The following is a copy of the opinion of the Hon. CHAS. E. DYER, District Judge, as reported in the 10th Bissell, C. C. Reports. The original paging is preserved for convenience in reference.]

PHŒNIX INSURANCE COMPANY OF BROOKLYN vs. ERIE & WESTERN TRANSPORTATION COMPANY.

DISTRICT COURT—EASTERN DISTRICT OF WISCONSIN—NOVEMBER, 1879.

IN ADMIRALTY.

1. MARITIME SERVICE OR CONTRACT—TEST OF.—The true test of what constitutes a maritime contract or service is whether it is to be substantially performed or rendered on navigable waters.

2. ADMIRALTY JURISDICTION—THROUGH BILLS OF LADING.—A contract was made for the shipment of grain from Chicago, by which it was agreed that the "Anchor Line" of propellers should carry the grain to Erie and there deliver it to the elevator company, as the agent of the

consignee, for transhipment by rail to certain inland points in Pennsylvania. The bills of lading denoted a rate of freight charged for a continuous transportation service from the point of shipment to the inland points named, and provided that only that carrier should be liable for loss in whose actual costody the grain might be at the time of loss: *Held*, that in the case of loss while the grain was in the course of water transit, the court of admiralty had jurisdiction of an action against the propeller company.

3. RIGHT OF CARRIER TO BENEFIT OF INSURANCE.—A common carrier may, by contract with the shipper of goods, secure to itself, in case of any damage or loss to the goods, for which the carrier is liable, the benefit of any insurance to be effected by the shippers.

4. In such case the payment of a loss by the insurer to the shippers does not give the former any right of action against the carrier.

5. EFFECT OF STIPULATION AS TO INSURANCE—NEGLIGENCE.—It was stipulated in bills of lading that the carrier should not be liable for loss by perils of navigation, and that in case of loss for which the carrier should be liable, he should have the benefit of insurance effected by the insurers. A loss occurred, the proximate cause of which was a peril of navigation, but the remote cause was the negligence of the carrier. The insurer having paid the loss to the shippers, it was *held* he was not subrogated to their rights against the carrier and could maintain no action against the latter.

This was a libel to recover for the loss of certain shipments of grain delivered on board the propeller Merchant, July 24, 1874, at Chicago, to be transported, so far as it was to be carried on the lakes, to Erie, Pennsylvania.

At the time stated libellant was a corporation of the state of New York, authorized to transact a general lake and inland insurance business. Respondent was a corporation of the state of Pennsylvania, authorized to carry on the business of lake transportation, and was the proprietor of a line of propellers running between Erie and lake ports, designated as the "Anchor Line," one of which boats was the propeller Merchant.

On said 24th day of July, 1874, the Merchant received on board, at Chicago, 16,325.34 bushels of corn, consigned to

A. M. Wright & Co.; 800 bushels of corn, consigned to Elmendorf & Co., and 689 02 bushels of oats and 307.30 bushels of corn consigned to Gilbert Wolcott & Co. Bills of lading were issued for and on account of these several shipments, the parts of which acknowledging receipt of the grain, were as follows:

Received, Chicago, July 24, of A. M. Wright & Co., the following packages (contents unknown), in apparent good condition, 16,325.34 bushels of corn; order A. M. Wright & Co., Liverpool, Eng. Notify American Steamship Co., Philadelphia, Pa. Pro. Merchant.

Received, Chicago, July 24, 1874, of Elmendorf & Co., the following packages (contents unknown), in apparent good condition, 400 bushels corn, order Elmendorf & Co. Notify Abm. Whitenack, Bound Brook, N. J.; 400 bushels corn, order same. Notify same. Notify Wilkinson, Geddes & Co., Newark, N. J.

Received, Chicago, July 24, 1874, of Gilbert Wolcott & Co., the following packages (contents unknown), in apparent good condition, 689.02 bushels white oats, 370.30 bushels No. 2 corn; order Gilbert Wolcott & Co. Notify Louis Buehler, Tamaqua, Pa. Pro. Merchant.

Material parts of the heading of these bills of lading were as follows:

Anchor Line; Lake and Rail *via* Erie and the Anchor Line Steamers, from all Lake Michigan ports. The Erie and Western Transportation Company is the proprietor of the "Anchor Line," which issues this bill of lading, and is a corporation of the state of Pennsylvania, having a real capital. The "Anchor Line" is the authorized and exclusive agent of the Pennsylvania Railroad Co., for its lake business *via* the Philadelphia & Erie Railroad and connections. It offers to the public a line of first class propellers, between the city of Erie and lake ports. Responsible through bills of lading and the shortest lake and rail line to the East.

In the bill of lading, issued to Wright & Co., was the clause, "rates from Chicago to Philadelphia @ 16c. per bus;" in that issued to Elmendorf & Co., "rates from Chicago to Bound Brook and Newark, 17c. per bus.;" and in that issued to Gilbert Wolcott & Co., was the clause, "rates from Chi-

cago to Tamaqua, Pa., corn 17c., oats 11c. bus." Each of these bills contained these further clauses:

That the said Anchor Line and the steamboats, railroad companies and forwarding lines, with which it connects, and which receive said property, shall not be liable * * * for loss or damage by fire, collision, or the dangers of navigation while on seas, bays, harbors, rivers, lakes or canals. And where grain is shipped in bulk, the said Anchor Line is hereby authorized to deliver the same to the Elevator Company at Erie, as the agent of the owner or consignee, for transhipment (but without further charge to such owner or consignee), into the cars of the connecting railroad companies or forwarding lines, and when so transhipped in bulk, the said Anchor Line and the said connecting railroad company or carrier shall be, and is, in consideration of so receiving the same for carriage, hereby exempted and released from all liability for loss either in quantity or weight, and shall be entitled to all the other exemptions and conditions herein contained.

It is further stipulated and agreed, that in case of any loss, detriment or damage done to or sustained by any of the property hereby receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment or damage, and the carrier so liable, shall have the full benefit of any insurance that may have been effected upon or on account of said goods.

On the day of shipment, the libellant through its agent in Chicago, made an insurance on the consignment to Wright & Co. of $8,000, on that to Elmendorf & Co. of $250, and on that to Gilbert Wolcott & Co., of $700.

The Merchant, laden with the grain covered by these bills of lading, left the port of Chicago July 24th, and proceeded on her voyage to Erie. Having reached a point about ten miles south of Milwaukee, she was on the next day, at about nine o'clock in the morning, stranded in a fog on the west shore of Lake Michigan. By reason of this event, there was a total loss to the shippers of these several shipments of grain. Notices of abandonment were given to the insurance company, and on claim made, libellant paid to the several shippers

the amounts of insurance on their respective shipments as and for a total loss.

The libel alleged that these shipments of grain were placed on board the Merchant, to be carried to Erie and there delivered for the shippers for transhipment; that the loss did not occur by reason of fire, collision, or the dangers of navigation, but was occasioned by the unseaworthiness of the vessel, and unskillfulness, carelessness and negligence in her conduct and management while on her voyage; and that by payment of the insurance on said shipments, libellant became subrogated to all the rights, interests and rights of action of the assured against the carrier. It was also alleged that these shipments of grain were in fact wholly lost, except about 5,188 bushels, which quantity was brought into the port of Milwaukee in a perishable condition, and unfit for transhipment, and was sold by respondent for $1,037.60.

The suit being *in personam*, and the respondent being a corporation of another state, service was obtained by process of attachment levied upon a vessel of the Anchor Line, found within the jurisdiction of the court, as authorized by the rules in admiralty.

The answer put the libellant upon proof of various allegations in the libel, and denied that the loss was occasioned by unseaworthiness of the propeller, or the unskillfulness, mismanagement, carelessness or negligence of respondent, or of any of its officers, agents or servants.

It was alleged that the propeller was seaworthy, and that the loss occurred by a peril of navigation, without any fault of the vessel, or any fault, negligence or want of skill on the part of those in charge of her.

As an affirmative defense it was alleged that at the time of the loss, the grain covered by the bills of lading was in the actual custody of the respondent, which was the carrier there-

of, and that if any liability arose on account of the loss (which was denied), respondent was the company and carrier alone answerable therefor, and therefore, that by the provisions of the bills of lading, respondent became entitled to the full benefit of the insurance on the grain; and so, that no action could be maintained by libellant against respondent, on account of the loss.

A further defense interposed was that the court had no jurisdiction of the subject-matter of this action; and the ground of this defense was that by the bills of lading the grain in question was to be transported by respondent by boat, railroad companies and forwarding lines to points and places in the states of Pennsylvania and New Jersey, viz: Philadelphia, Tamaqua, Bound Brook and Newark; that it was understood and agreed by the parties that part of the transportation should be performed on land and by means of railroad cars, and that, therefore, the alleged causes of action set out in the libel were not causes of admiralty jurisdiction.

Van Dyke & Van Dyke and *N. J. Emmons, for libellant.*

W. P. Lynde and *George B. Hibbard,* for respondent.

DYER, J.—Upon the issues made by the pleadings, three questions arise, which were very fully and ably argued at the bar.

1. Has the court jurisdiction of the subject-matter of this action?

2. If the court has jurisdiction, and the case is to be considered on its merits, was the loss occasioned solely by a peril of navigation, or by the unseaworthiness of the vessel or the negligence and unskillfulness of those in charge of her, either in connection with, or in the absence of such peril?

3. Is the respondent entitled to the benefit of the insurance in this case?

First. Upon the question of jurisdiction, the claim of the respondent is, that the bills of lading were through contracts to carry the grain from Chicago to the several points inland, in Pennsylvania and New Jersey, by means of steamboats and railroads; that they were contracts made on land, to be performed on land by means of land carriage, in consideration of a single, entire through freight, which would be earned only on performance of the contracts, and that the contracts were, therefore, not maritime. It is true that the bills of lading denote a rate of freight for a continuous transportation service from the point of shipment to inland points in the states named; and to that extent they may be characterized as through contracts.

It is true, also, that part of this service was to be by rail, but the service to be performed by the Anchor Line was to be exclusively on water. The contracts were, that this line would carry the grain to Erie, and there deliver it to the elevator company, as the agent of the consignee for transhipment. This line, as the bills of lading indicate, was but the agent of the connecting railways, and it would seem that the contracts for carriage beyond Erie were made by respondent as such agent. Furthermore, the bills of lading expressly provide that of the several connecting carriers, only the one upon whose line a loss might happen, should be responsible therefor; consequently for a loss while the grain should be in course of land transit, the respondent would not be liable. The loss in this case happened while the property was in course of water transit between the points expressly designated in respondent's contracts, and was therefore a loss for which, by the express terms of the contract the connecting carriers could not be made answerable. Although a single

through freight was charged, the distinct and independent service to be rendered, by respondent, or its line, was the carriage of the grain by water on one of its boats, from Chicago to Erie, and its service actually ended at that point. And although, under the contracts, the shipper might compel the connecting carriers to receive the grain and transport it to the points of consignment, it does not follow that the obligation of the respondent was to carry the grain further than to Erie, and there deliver it for transhipment. The provision in the bills of lading as to responsibility for loss, makes the contracts of carriage several with each carrier as to liability. The Pennsylvania Railway Co. would not be liable for loss happening while the grain was in transit between Chicago and Erie, and respondent would not be liable for loss occurring while transportation service was being rendered between Erie and Philadelphia, Tamaqua, Bound Brook and Newark. The obligation of the railway company to receive the grain and transport it to inland points would arise from the fact that its authorized agent, the Anchor line, had contracted in its behalf that it would so do, on delivery of the grain at Erie. The undertaking of respondent was not to carry the grain to inland points, because its liability as a carrier was restricted to its own route.

The point was made upon the argument that the contracts specify that the grain was to be transported until it had "reached the point named in this bill of lading." The provision, however, is not that the transportation service shall be wholly rendered by the Anchor Line, but the language is, " to be transported by the Anchor Line, and the steamboats, *railroad companies and forwarding lines* with which it connects, until " the property " shall have reached the point named in this bill of lading."

Various illustrations were put by the learned counsel for

respondent as tests of admiralty jurisdiction. They are more ingenious, than sound. A contract to build a ship is not a maritime contract. A contract for her towage is. It is supposed that a contract is made to build a ship in Milwaukee and to tow her to Detroit, and there deliver her for a whole sum, and it is asked if a court of admiralty would have jurisdiction of a cause of action founded upon a breach of the contract to tow the the ship to the place of delivery. Concede, for the purpose of the illustration, that it would not, and if not, the reason is obvious, namely, that the towage service in such a case would be the mere incident of the principal thing, which would be the building of the ship, and of this principal subject-matter of the contract a court of admiralty would have no cognizance. Again, it is supposed that a railroad company had contracted to carry property from New York to St. Louis, and that by the negligence of servants upon a steam ferry boat belonging to the company upon the Detroit river, the property should be damaged, it is asked, whether an action *in personam* in admiralty could be maintained against the carrier. Again the answer is that if not, it would be because the transhipment or transfer by ferry would be merely incidental to the carriage of the property by land from New York to St. Louis, and no substantial part of the service was to be performed otherwise than on land.

The true test of a maritime contract or a maritime service is whether it is to be substantially performed or rendered on navigable waters; if it is, then it is of maritime character, and the court of admiralty has jurisdiction. If it is not, then jurisdiction is disclaimed. That a very substantial part of the service to be performed under these contracts was to be performed upon navigable waters is not to be disputed. The loss happened upon these waters, while such service was being rendered, and under the construction of the contracts before

given, and by virtue of the principle last stated, I cannot doubt that a court of admiralty has jurisdiction of the subject-matter of this suit.

Second. To what was the stranding of the propeller attributable? Did it arise solely from a peril of navigation, or was there co-operating negligence?

(Upon a review of the facts which this question involved, it was held by the court that there was negligence on the part of the master and mariners who were navigating the vessel at the time, and that although a peril of navigation was the proximate cause of the loss, the remote cause was such negligence.)

The last, and more difficult and interesting question remains to be considered, namely: is the respondent entitled to the benefit of the insurance in this case?

The various grounds upon which libellant urges its right to recover are—

1. That the loss in question was occasioned by the negligence of the carrier; that therefore the shippers had a right of action against the carrier, notwithstanding the stipulations in the bills of lading limiting its liability; that the insurance company having paid the amount of the losses to the shippers, became subrogated to their rights, and may therefore maintain its action against the carrier for the amount so paid, and the carrier cannot avail itself of the clause in the bills of lading giving to it the benefit of the insurance, the loss having resulted from its own negligence.

2. That it is not proven that the shippers affirmatively assented to the limitations of liability and special provisions contained in the bills of lading, and hence that such limitations and provisions are not part of the contract of shipment.

3. That the clause in the bills of lading limiting liability, including the provision in question, are wholly void, because

of a statute of the state of Illinois[1]—where the contracts were made—which makes it unlawful for a common carrier to limit its common law liability safely to deliver property by any stipulation or limitation expressed in the receipt given for such property.

The principal propositions urged in reply by respondent are—

1. That it clearly appears from the proofs, that the bills of lading, with all the clauses and stipulations which they contain, constituted the contracts between the carrier and the shipper under which the grain was shipped.

2. That the statute of Illinois referred to does not apply to bills of lading issued on account of shipments, as in this case, and that in any event it is not controlling upon this court, the question involved being one of general commercial law.

3. That the stipulation giving to the carrier the benefit of insurance is valid, even though the carrier cannot relieve itself from the consequence of its own negligence; that whether the losses in question arose from negligence or not, after the insurance company made payment to the shippers, they, the shippers, had no right of action against the carrier; that therefore there was no right to which libellant could be subrogated, and as a consequence, that no action will lie against respondent; in other words, that the stipulation in question displaced or destroyed the right, which might otherwise exist, of the insurance company on payment of the insurance, to proceed against the carrier for reimbursement.

Without going at large into the proofs upon the question, it will suffice to say, that I think the bills of lading should be regarded as the contracts between the shippers and the car-

[1] Illinois Revised Statutes, chapter 27.

rier, under which the grain was shipped. It is true that the decisions in Illinois enunciate a very strict rule in relation to proof of affirmative assent to special conditions in said contracts—a rule much stricter than is laid down by the Supreme Court of this state, and some other courts.

But the proofs here are very satisfactory as to the shipper's understanding and knowledge of the character and contents of these bills of lading, and as to their acceptance of them with such knowledge of their character. The case is much stronger in that regard upon the facts, than *Railroad Co. vs. Manufacturing Co.*, 16 Wallace, 318, in which it was held, that an unsigned general notice, printed on the back of a receipt, does not amount to a special contract limiting common law liability, though the receipt with such notice on it, may have been taken without dissent. In this state it has been held that when such a contract is shown in the custody of the shipper, its due delivery and his assent to its terms, are to be presumed, and that the burden is upon him to obviate these presumptions by proof. But, it is not, I think, necessary to go thus far in order to sustain these bills of lading as contracts assented to by the shippers. By affirmative evidence, it is sufficiently shown, that they were understood and accepted as contracts under which the shipments were made; and what transpired between the shippers and the agent of the carrier prior to the delivery of the grain on board, and the execution of the bills of lading, was evidently understood by the parties as only the usual preliminary negotiations and understanding in relation to the shipments, which were to be followed by consummated contracts in the form of bills of lading.

There has been much controversy in the courts as to the power of a common carrier to limit its common law liability by special contract. Since the cases of the *New Jersey Steam*

Navigation Co. vs. The Merchants' Bank, 6 Howard, 344, and *York Company vs. Central Railroad*, 3 Wallace, 107, the question, dealt with independently of statutory regulation, has not been an open one in the Federal Courts; and the right of the carrier to restrict or diminish his general liability by special contract, has been re-affirmed in *Railroad Co. vs. Manufacturing Co.*, 16 Wallace, 318, and in *Bank of Kentucky vs. Adams Express Co.*, 93 United States, 174.

It is equally well settled that a common carrier cannot lawfully stipulate for exemption from responsibility for the misconduct or negligence of himself or his servants. *Railroad Co. vs. Lockwood*, 17 Wallace, 357; *Bank of Kentucky vs. Adams Express Co. supra.*

Upon finding the fact of negligence in navigating the vessel, it follows therefore, in the case at bar, that the owners of the cargo could have recovered against the carrier, notwithstanding the limitations of liability expressed in the bills of lading.

An insurer of goods lost while in course of transportation by a common carrier, is entitled after payment of the loss, to recover what he has paid by suit against the carrier. No right, in the absence of special contract to the contrary, is better established. The legal principles upon which this right rests, are more clearly stated in *Hall & Long vs. Railroad Companies*, 13 Wallace, 370, by Mr. Justice STRONG, who says:

"It is too well settled by the authorities to admit of question, that as between a common carrier of goods and an underwriter upon them, the liability to the owner for their loss or destruction, is primarily upon the carrier, while the liability of the insurer is only secondary. The contract of the carrier may not be first in order of time, but it is first and principal in ultimate liability. In respect to the ownership of the goods, and

the risk incident thereto, the owner and the insurer are considered one person, having together the beneficial right to the indemnity due from the carrier for a breach of his contract, or for non-performance of his legal duty. Standing thus, as the insurer does, practically, in the position of a surety, stipulating that the goods shall not be lost or injured in consequence of the peril insured against, whenever he has indemnified the owner for the loss, he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable. His right rests upon familiar principles of equity. It is the doctrine of subrogation, dependent not at all upon privity of contract, but worked out through the right of the creditor or owner."

In *Hart and others vs. Western Railroad Corporation*, 13 Metcalf, 105, Ch. J. SHAW, states the principle as follows: "Now, when the owner, who *prima facie* stands to the whole risk and suffers the whole loss, has engaged another person to be at that particular risk for him, in whole or in part, the owner and the insurer are, in respect to that ownership and the risk incident to it, in effect one person, having together the beneficial right to an indemnity provided by law for those who sustain a loss by that particular cause. If, therefore, the owner demands and receives payment of that very loss from the insurer, as he may, by virtue of his contract, there is a manifest equity in transferring the right to indemnity, which he holds for the common benefit, to the assurer. It is one and the same loss for which he has a claim of indemnity, and he can equitably receive but one satisfaction. So that, if the assured first applies to the railroad company, and receives the damages provided, it diminishes his loss *pro tanto*, by a deduction from and growing out of a legal provison attached to, and intrinsic in, the subject insured. The liability of the railroad company is, in legal effect, first and

principal, and that of the insurer secondary; not in order of time but in order of ultimate liability. The assured may first apply to whichever of these parties he pleases; to the railroad company, by his right at law, or the insurance company, by virtue of his contract. But if he first applies to the railroad company, who pay him, he thereby diminishes his loss, by the application of a sum arising out of the subject of the insurance, to wit: the building insured and his claim for the balance. And it follows, as a necessary consequence, that if he first applies to the insurer, and receives his whole loss, he holds the claim against the railroad company in trust for the insurers. Where such an equity exists, the party holding the legal right, is conscientiously bound to make an assignment in equity to the person entitled to the benefit; and if he fails to do so the *cestui que trust* may sue in the name of the trustee, and his equitable interest will be protected."

Now, were it not for the stipulation contained in the bills of lading, giving to the carrier the benefit of the insurance, there would be no question of libellant's right to recover. And the precise point of inquiry is, what is the effect of that stipulation?

The perils insured against were generally "of the seas," and after enumerating various specific perils, such as fires, enemies, jettisons, pirates and the like, the policy provides that the insurance company "takes upon itself all other perils, losses and misfortunes that * * * shall come to the hurt, detriment or damage of the said goods and merchandise or any part thereof."

The question under consideration was to great extent argued by the learned counsel for libellant, upon the theory that to give to the carrier the benefit of the provision relating to insurance, would be to give effect to the limitation of its common law liability for the grain and its safe delivery con-

tained in the bills of lading, even as against the carrier's own negligence. I do not perceive a necessary connection between the clause in the bills of lading limiting liability for a safe delivery of the cargo, and the clause giving to the carrier the benefit of the insurance, nor that it follows that because the former cannot exonerate itself from liability for negligence, the latter clause may not be held valid. To give the carrier the benefit of the insurance it must be liable to the shipper for the loss. Liability must exist as a pre-requisite to a claim to the insurance. The agreement is, that if the carrier shall be liable for the loss, then he shall have the benefit of the insurance. And if it be correct to say that the validity of the stipulation relative to insurance is not dependent upon the validity of the clause which attempts to limit liability for the property, or, in other words, that the effect of the stipulation relating to insurance is not to defeat the obligation of the carrier to indemnify the owner against loss occasioned by its negligence, then it would seem that the Illinois statute does not bear upon the right of the carrier to contract with the shipper for the benefit of the insurance.

That statute provides: "Whenever any property is received by a common carrier to be transported from one place to another, within or without this state, it shall not be lawful for such carrier to limit his common law liability safely to deliver such property at the place to which the same is to be transported by any stipulation or limitation expressed in the receipt given for such property."[1]

As will be observed, the prohibition here is against any limitation of common law liability safely to deliver the property; but this does not involve the right to stipulate for the benefit of the insurance in case of loss and liability. These clauses

[1] Illinois Revised Statutes, chapter 27.

in the bills of lading are to be read as the application to them of legal principles requires, and so reading them, the provisions would in terms be that the carrier "shall not be liable * * * for loss or damage by fire, collision or the dangers of navigation while on seas, bays, harbors, rivers, lakes or canals," unless such loss or damage shall be occasioned by the negligence of said Anchor Line, its agents or servants. And, "in case of any loss, detriment or damage done to or sustained by any of the property hereby receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, * * * the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods."

Admitting, then, that the loss of the cargo resulted remotely from the negligence of the carrier, the question recurs, can that part of the contract which gives to the carrier the benefit of the insurance be enforced as a valid agreement? In the absence of such agreement, on payment of the whole loss by the insurer, the insured would hold their claim against the carrier in trust for the insurer. And if the agreement be valid, I think it follows, that on payment of the loss by the carrier, the insured would hold their claim against the insurer in trust for the carrier; and further, with this agreement in force, on payment of the loss by the insurer, the insured would have no right to go against the carrier, because the loss would be satisfied with moneys to which the carrier, as between it and the insured, would be entitled. It is settled by controlling authority that a common carrier has an insurable interest in the goods he carries, and can contract for the benefit of insurance effected by the owner. [1]

[1] *Van Natta vs. Security Ins. Co.*, 2 Sandford, 490; *Chase vs. Washington Marine Ins. Co.*, 12 Barbour, 595; *Mercantile Mut. Ins. Co. vs. Calebs*, 20 New York, 177; 2 Parsons on Insurance, 200.

In *Savage vs. Corn Exch. Ins. Co.*, 36 New York, 655, it was held that a common carrier being bound to make safe delivery of goods at the place of destination, such obligation, together with his claim for advances and freight, gives him an insurable interest to the extent of the fair value of the property insured. Coming, then, directly to the point in issue, a test of the validity of this stipulation would seem to be, could the carrier recover for a loss happening confessedly through his negligence upon a contract of insurance, insuring against perils of the sea? Upon this question, counsel for libellant lay down the proposition, that negligence of a carrier or ship owner, if it can be insured against at all, must be made the subject-matter of express contract, which cannot admit of a reasonable doubt. Formerly, this was a vexed question in the courts, but it is now fully and firmly settled, by both English and American decisions, that a loss whose proximate cause is one of the enumerated risks in the policy, is chargeable to the underwriter, although the remote cause may be traced to the negligence of the master and mariners.[1]

In the case of *General Mutual Insurance Company vs. Sherwood*, 14 Howard, 351, it was held that damages decreed by a court of admiralty to be a lien on the vessel insured, by reason of a collision produced by the negligence of those who navigated the vessel, cannot be recovered under a policy insuring against the usual perils and including barratry. The facts were peculiar. The plaintiffs in the action were the owners of a brig. Through the negligence of the master and mariners of the brig, another vessel was injured. In proceedings on the part of the injured vessel, the brig and her owners

[1] *Patapsco Ins. Co. vs. Coulter*, 3 Peters, 222; *Columbia Ins. Co. vs. Lawrence*, 10 Peters, 507; *General Mut. Ins. Co. vs. Sherwood*, 14 Howard, 351; *Copeland et. al. vs. The New England Marine Ins. Co.*, 2 Metcalf, 432, and cases cited in these decisions.

were adjudged liable for the damages, and the decree pronounced the collision to have occurred in consequence of the negligence. On payment of the decree, the owners of the brig sued the insurance company on a time policy, and set up the facts expressly alleging the negligence as the reason why they had paid the damages, and it was held they could not recover. It was therefore not the case of the insurers going behind the cause of loss and defending, by showing that this cause was produced by negligence, which Mr. Justice CURTIS says could not be done, but it was the case of the insured himself going behind the collision and showing as the sole reason why he had paid the loss, the negligence of his own servants and agents.

In *Copeland vs. Insurance Company*, 2 Metcalf, 432, Ch. J. SHAW, in a very exhaustive opinion, containing a lengthy review of the authorities, held that "a vessel which is insured on a voyage out and home, and which departs with officers and a crew competent for the voyage, does not become unseaworthy by reason of the master's becoming incompetent, at the foreign port, to command the vessel; and if the vessel sails from such port under his command, and is lost on the homeward passage, the underwriters are not discharged, although the loss may have been caused by the master's incapacity. And although, in such case of the master's incompetency, it is the duty of the mate to take command of the vessel, and although he has a right to resort to all lawful means to establish himself in the command; yet if, from want of judgment, or even from culpable negligence, he omits so to do, and the vessel sails under the master's command, and is stranded, the underwriters are not discharged." And in the opinion there is this enunciation of the law which is specially pertinent: "It is very clear in this case, that the immediate cause of the loss, was stranding in the night time, which is one of the perils in-

sured against; and the case supposed is, that this was occasioned by the default of the mate in not assuming the command. The default must consist, either in a want of judgment in perceiving and determining that the master had become so deranged or incapacitated as to authorize and require him to interpose, or in negligence in the performance of his duty, when the case occurred. Such a case may occur in every voyage, and must be considered as one of the contingencies incident to navigation. It may often present questions of great difficulty, in acting on which, mistakes on the part of the officer second in command may occur. But we cannot perceive why the duty of the mate was not of a purely official and professional character, growing out of his powers and the relation in which he stood as an officer, and not devolving on him as the agent of the owners, in any other sense than that in which pilots and all other officers and mariners are their agents. They are vested with certain powers to be exercised for the use and benefit of owners, freighters, underwriters, and all others, who are directly or remotely interested in the vessel and voyage. I cannot distinguish the negligence of the mate, in the case supposed, from his failure in the performance of any other duty as a nautical man. Suppose a case of a loss by stranding, and it could be satisfactorily proved, that if, in a particular emergency, sail had been made or taken in, if an anchor had been carried out or the vessel put on another tack, the disaster might have been avoided, it would indicate a similar mistake of judgment or neglect of duty on the part of the commanding officer as that in the case supposed. In both cases, it is a mistake or neglect of his peculiar and appropriate duty as an officer and seaman. For the performance of these duties, we are of opinion that the owners, as between themselves and the underwriters, are not responsible. A contrary doctrine would lead to questions of great difficulty, involving

numerous questions of fact of very difficult proof, as to the skill and seamanship of all the nautical measures taken in the whole conduct of the voyage. Besides, these mistakes of judgment and instances of negligence are incident to navigation, and constitute a part of the perils that attend it; and they can no more be restrained, prevented, or guarded against, by the owners, than by the underwriters. The most cautious foresight can only enable owners to provide a competent crew of officers and seamen at the commencement of the voyage. What reasons, then, are there of justice or policy, what considerations growing out of the nature of this contract, or the relations of the parties, which should prevent the owners from insuring themselves against this peril?"

Stranding is a peril of the sea. In the case at bar, the stranding of the vessel was the proximate cause of the loss. The remote cause was the negligence of the master and mariners in navigating the vessel. The law being as stated, it follows, that if the case were that of insurance in favor of the carrier against the perils of the sea, the insurer could not go behind the proximate cause of the loss and defeat a recovery by showing the negligence of the master and crew of the vessel. We have, then, this state of case: The carrier made itself liable for the loss of the cargo by a peril of the sea, if negligence co-operated in causing the loss. The owners of the cargo contracted with the carrier that if loss should occur for which liability arose, the carrier should have the benefit of any insurance on the property. The shippers then contracted for insurance against the usual perils. There was a loss for which the carrier was primarily liable to the shippers. The proximate cause of the loss was a peril of the sea. It was a loss, therefore, which the carrier could directly insure against, and the fact that its remote cause was negligence would not relieve the insurer. Why could not the carrier se-

cure, by the indirect way of a contract with the shippers, in case of its liability for a loss, the benefit of their insurance, if it could by direct contract with the insurer, have obtained indemnity against loss caused proximately by a peril insured against, but remotely by its own negligence? If it be said that the rights of the insurance company ought not to be affected by a contract between the shipper and the carrier, I think it may be answered that the company put itself in privity with such contract, by its contract of insurance while the property was in transit, and that it dealt with the insured property, subject to the terms of the bills of lading, which gave to the carrier the benefit of the insurance in case of loss for which the carrier should be liable. The case does not show that any fraud was intended by the carrier in making this stipulation with the shippers. The agent of the insurance company was also the agent of the carrier, and the same person issued the certificate of insurance and made the contracts of shipment with the shippers. And in the light of all the facts and the legal principles which I have endeavored to state, I cannot bring my mind to any other conclusion, than that this was a lawful and valid contract. If this be so, then upon receiving payment for their losses from the insurer, the right of the insured to proceed against the carrier was determined, and no such right remained to which the insurer could be subrogated, because necessarily the insurer must take the rights of the owners of the cargo subject to all agreements and equities between the insured and the carrier. *Mercantile Ins. Co. vs. Calebs et al.*, 20 New York, 173.

In the case last cited, the Court of Appeals of New York held that a common carrier may, by contract with the owners, secure to himself, in case of damage or loss to the goods for which the carrier would be liable, the benefit of any insurance to be effected by the owner, and that this abandonment to the